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Attorneys for Plaintiff
24 Hour Fitness USA, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
SAN JOSE DIVISION

24 Hour Fitness USA, Inc.,

Plaintiff,

vs.

Apex Stores, LLC; Apex, LLC; Apex at
Home, LLC

Defendants.

No. CV 08 1681 HRL

FIRST AMENDED COMPLAINT FOR
DECLARATORY RELIEF AND DEMAND
FOR JURY TRIAL

Plaintiff 24 Hour Fitness USA, Inc. ("24 Hour Fitness" or "Plaintiff"), for its
complaint against Apex Stores, LLC ("Apex Stores") Apex, LLC ("Apex"), Apex at Home, LLC
("Apex at Home") (collectively, "Defendants") alleges as follows:

NATURE OF THE ACTION

1. This is an action for declaratory judgment brought under the Declaratory Judgment Act,
28 U.S.C. § 2201, for the purpose of determining actual questions of controversy between the
parties. The claims alleged herein arise under the Lanham Act, 15 U.S.C. § 1051 *et seq.*
Defendants have alleged that Plaintiff's use of Plaintiff's federally registered APEX marks is
likely to cause confusion with Defendants' own APEX formative marks. Plaintiff now seeks a
judicial declaration that its use of its APEX marks do not infringe on Defendants' marks.

THE PARTIES

2. Plaintiff is a corporation organized and existing under the laws of California, with a principal place of business at 12647 Alcosta Boulevard, Suite 500, San Ramon, California 94583.

3. On information and belief, defendants Apex Stores, LLC, Apex, LLC, and Apex Homes, LLC are limited liability companies organized and existing under the laws of Rhode Island, with a principal place of business at 100 Main Street, Pawtucket, Rhode Island 02860.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to (i) 28 U.S.C. § 1331, as this action arises out of the laws of the United States of America; (ii) 15 U.S.C. § 1121, as this action involves claims under the Lanham Act of 1946, as amended, 15 U.S.C. § 1051 et seq.; (iii) 28 U.S.C. § 1338(a) and (b), as this action arises in part under an Act of Congress relating to trademarks; and (iv) 28 U.S.C. § 2201, as this is an action for declaratory judgment brought for the purpose of determining actual questions of controversy between the parties.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) as this is the judicial district in which a substantial part of the events or omissions giving rise to Defendants' claims of infringement allegedly occurred.

6. Defendants Apex Stores, LLC, Apex, LLC, and Apex at Home, LLC have sufficient minimum contacts with the State of California subjecting each of them to the personal jurisdiction of this Court pursuant to California's long-arm statute, Cal. Code Civ. Pro. § 410.10.

INTRADISTRICT ASSIGNMENT

7. This action has been assigned to the San Jose Division by the Court.

24 HOUR FITNESS AND ITS APEX FITNESS GROUP BUSINESS

8. 24 Hour Fitness is a premier chain of health and fitness clubs. In fact, it is one of the largest privately-held health and fitness chains in the world. Founded in 1983, its mission is to enhance people's lifestyles through fitness and regular exercise. Its clubs are distinguished by high quality services, including numerous cardiovascular and strength training machines and exercise equipment, superior aerobic and exercise classes, a wide range of free weights, and many

amenities, such as personal training programs, basketball and racquetball courts, lap pools, rock climbing, saunas, pro shops, child care, knowledgeable staff, and much more.

9. Though its Apex Fitness division, also doing business as the Apex Fitness Group, 24 Hour Fitness also provides cutting-edge integrated fitness and nutrition programs and products under distributorships offered to health and fitness clubs throughout the United States (“Plaintiffs’ Goods and Services”), which in turn market Plaintiff’s Goods and Services to their club members. Plaintiff has offered Plaintiff’s Goods and Services in the health and fitness field under the APEX trademark since at least as early as 1994. In connection with its business, 24 Hour Fitness offers the following products and services under the APEX marks listed below (“Plaintiff’s Marks”), among others.

Mark	Reg. / App. No.	Goods/Services
APEX FIT (Stylized)	3,045,062	Class 5: Nutritional products, namely nutritional supplements and nutritionally fortified beverages; dietary supplements in the nature of nutritional bars and cookies; food supplements; meal replacement and dietary supplement drink mixes and powders; nutritional drink mix or powder for use as a meal replacement; vitamins.
APEX LEAN (Stylized)	3,034,722	Class 5: Nutritional products, namely nutritional supplements and nutritionally fortified beverages; dietary supplements in the nature of nutritional bars and cookies; food supplements; meal replacement and dietary supplement drink mixes and powders; nutritional drink mix or powder for use as a meal replacement; vitamins.
APEX FIX (Stylized)	3,004,281	Class 29: Food products, namely soy based food bars and cookies.
APEX FIX (Stylized)	3,004,280	Class 30: Food products, namely grain based food bars and cookies.
APEX MAX (Stylized)	2,997,642	Class 5: Nutritional products, namely nutritional supplements and nutritionally fortified beverages; dietary supplements in the nature of nutritional bars and cookies; food supplements; meal replacement and dietary supplement drink mixes and powders; nutritional drink mix or powder for use as a meal replacement; vitamins.
APEX & Design	2,936,205	Class 5: Nutritional and food supplements; vitamins and minerals; vitamin and mineral supplements Class 9: Audio and visual recordings, namely, pre-recorded cassettes, videos, DVDs, and CD-ROMs in the field of health, fitness, or nutrition Class 16: Printed matter, namely books, instruction manuals, periodicals, brochures, and magazines in the field of health, fitness, or nutrition Class 35: Distributorship featuring vitamins & fitness programs Class 41: Instruction and training services in the field of fitness and nutrition

Mark	Reg. / App. No.	Goods/Services
		Class 44: Providing information in the field of nutrition and fitness
APEX FITNESS GROUP (and Star Person Design)	2,703,428	Class 35: Distributorships featuring vitamins and fitness programs in the form of licensed software, videotapes, and printed information
APEX FITNESS GROUP (and Star Person Design)	2,702,445	Class 9: Audio and visual recordings, namely, prerecorded cassettes, compact discs, videos, DVDs, and CD-ROMS in the field of health, fitness, or nutrition
APEX FITNESS GROUP (and Star Person Design)	2,702,444	Class 16: Printed matter, namely books, instruction manuals, periodicals, brochures, and magazines in the field of health, fitness, or nutrition.
APEX TRAINING SYSTEM (and Star Person Design)	2,701,627	Class 35: Distributorships featuring vitamins and fitness programs in the form of licensed software, videotapes, and printed information
APEX FITNESS GROUP VIRTUAL GYM	78/851,695	Class 41: Providing an on-line computer database featuring information regarding fitness services which allow users to create fitness programs; providing information in the field of fitness and bodybuilding; consultation services with personal trainers. Class 44: Providing information in the field of nutrition

Attached as Exhibit 1 are true and correct copies of the electronic records for these registrations printed from the United States Patent and Trademark Office's ("USPTO") online database.

DEFENDANTS' BUSINESS

10. On information and belief, Defendants' predecessor companies were founded in 1924 as a tire retreading, automotive service and manufacturing business, and have since expanded in various retail businesses including real estate development and management and financial services. In connection with their business, Defendants offer the following products and services under an APEX mark ("Defendants' Marks"):

MARK	App./Reg. No.	Goods or Services
APEX	1,847,961	IC 042. US 101. G & S: retail department store services. FIRST USE: 19420900. FIRST USE IN COMMERCE: 19420900
APEX	2,155,905	IC 037. US 100 103 106. G & S: automotive repair and maintenance services. FIRST USE: 19240000. FIRST USE IN COMMERCE: 19240000 IC 042. US 100 101. G & S: retail automobile parts and accessories stores. FIRST USE: 19240000. FIRST USE IN COMMERCE: 19240000
APEX MALL	2,657,639	IC 036. US 100 101 102. G & S: Shopping mall services and

		leasing of shopping mall space. FIRST USE: 19660000. FIRST USE IN COMMERCE: 19660000
APEX STORES	2,443,933	IC 035. US 100 101 102. G & S: Retail store, mail order purchase and computerized on-line retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, housewares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, giftware, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes, athletic footwear, novelties, food and Christmas items. FIRST USE: 19961101. FIRST USE IN COMMERCE: 19961101
APEX ONLINE	2,562,812	IC 035. US 100 101 102. G & S: Retail store, mail order purchase and computerized on-line retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, housewares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, giftware, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men' s and ladies' accessories, shoes, athletic footwear, novelties, food and Christmas items. FIRST USE: 19961101. FIRST USE IN COMMERCE: 19961101
APEX ADVANTAGE	2,918,976	IC 040. US 100 103 106. G & S: Custom finishing and embellishment of promotional items, namely, embroidery, embossing, engraving, customized printing, imprinting, screen printing and pad printing with company names, logos, monograms, words, and/or pictures for promotional and advertising purposes on the goods of others, namely, sportswear, apparel and other products. FIRST USE: 19961201. FIRST USE IN COMMERCE: 20020901
APEX COMPANIES	3,244,685	IC 040. US 100 103 106. G & S: custom finishing and embellishment of promotional items, namely, embroidery, embossing, engraving, customized printing, imprinting, screen printing and pad printing with company names, logos, monograms, words, and/or pictures for promotional and advertising purposes on the goods of others, namely, sportswear, apparel and other products. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901
APEX COMPANIES	78/928,022	IC 035. US 100 101 102. G & S: Promoting the goods and services of others by placing advertisements and promotional displays in an electronic site accessed through computer networks; providing an on-line advertising guide featuring the goods and services of others; electronic retailing services and ordering services via computer featuring a wide variety of merchandise; Retail store and advertising services, featuring a wide variety of merchandise; arranging for others the repair, service and replacement of a wide variety of general merchandise and vehicles; retail automobile parts and accessories stores; retail store services featuring customer pick-up and/or payment of newly purchased or repaired

		merchandise; pick up and delivery services; business, advertising, marketing and management consulting services. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901
		IC 037. US 100 103 106. G & S: Automobile repair and maintenance. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901
APEX COMPANIES	78/928,052	IC 036. US 100 101 102. G & S: Shopping Mall services, namely leasing and management of shopping mall space; real estate management; financial services in the nature of investments and financing in the field of real estate, securities, debt, venture capital and loans. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901
		IC 037. US 100 103 106. G & S: Real estate development. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901

Attached as Exhibit 2 are true and correct copies of the electronic records for these registrations printed from the USPTO online database.

11. Upon information and belief, since on or before the filing of the original complaint in this action, Defendants have been and are offering their services under one or more of Defendants' Marks on the websites located at the domain addresses *apexathome.com* and *apexstores.com* (the "Apex Websites").

12. Upon information and belief, consumers located in all fifty states, including the State of California, can and do access the Apex Websites and transact business with Defendants.

13. Due to assignments recorded with the USPTO on April 30, 2008, all of the relevant trademark registrations and pending applications under Defendants' Marks, previously in the name of Apex Stores, LLC, are now registered or applied for in the name of Apex, LLC.

14. Apex Stores, LLC, Apex, LLC and Apex at Home, LLC are all listed with the Rhode Island Secretary of State Corporations Division as having the same corporate address and agent.

FACTUAL BACKGROUND

15. On or about December 15, 2006, the USPTO issued an office action in which it refused Defendant Apex Stores' U.S. Application Serial No. 78/928,022, for the mark APEX COMPANIES, based, in part, on certain of Plaintiff's federal registrations.

1 16. On or about November 1, 2007, counsel for Apex Stores sent 24 Hour Fitness a letter
2 enclosing a Petition for Cancellation that had been filed that same day with the USPTO (“Apex
3 Stores’ TTAB Cancellation Petition”). Attached as Exhibit 3 is a true and correct copy of this
4 letter with enclosure.

5 17. In Apex Stores’ TTAB Cancellation Petition, Apex Stores sought to cancel in whole or in
6 part Plaintiff’s Marks under U.S. Registration Nos. 2,701,627, 2,703,428 and 2,936,205 based on
7 its claim that these marks are confusingly similar to one or more of Defendants’ Marks in
8 violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). Apex Stores further asserted
9 the claim that Plaintiff’s continued use of Plaintiff’s Marks is diluting the distinctive quality of
10 one or more of Defendants’ Marks. *See* Exhibit 3. On December 12, 2008, Plaintiff answered
11 Defendant Apex Stores’ TTAB Cancellation Petition by denying Apex Stores’ relevant
12 allegations regarding likelihood of confusion and dilution and asserting its affirmative defenses.

13 18. Following Apex Stores’ November 1 letter, counsel for Plaintiff and Defendant discussed
14 the potential for settlement of Apex Stores’ TTAB Cancellation Petition, by means of a Letter of
15 Consent agreement that would allow Apex Stores to overcome the December 15, 2006 U.S.
16 Patent and Trademark Office citations to Plaintiff’s trademark registrations.

17 19. However, on or about March 10, 2008, counsel for Defendants sent counsel for Plaintiff a
18 letter stating that 24 Hour Fitness’ continued use of its APEX and APEX FITNESS marks
19 resulted in “a great likelihood of confusion” with Defendants’ marks, and that Defendants were
20 “unwilling to compromise” and wanted to “protect its rights.” Attached as Exhibit 4 is a true and
21 correct copy of this letter.

22 20. On March 27, 2008, 24 Hour Fitness filed the original Complaint in this action.

23 21. On April 11, 2008, counsel for 24 Hour Fitness sent a letter to counsel for Defendants in
24 an attempt to reinitiate discussions regarding resolution via a Letter of Consent agreement that
25 had originally been discussed after Defendant Apex Stores initiated its TTAB Cancellation
26 Action. Attached hereto as Exhibit 5 is a true and correct copy of the April 11, 2008 letter.

27 22. On May 5, 2008, Defendants Apex, LLC and Apex at Home, LLC filed an action in the
28 District of Rhode Island under Case No. 08-169 against 24 Hour Fitness for trademark

1 infringement under 15 U.S.C. § 1114 and 1125(a), and common law trademark infringement (the
 2 “Rhode Island Action”). Attached hereto as Exhibit 6 is a true and correct copy of the complaint
 3 in the Rhode Island Action.

4 23. The Rhode Island Action alleges that one or more of Plaintiff’s Marks is or are
 5 confusingly similar to one or more of Defendants’ Marks and requests as relief that the Rhode
 6 Island court issue a permanent injunction against 24 Hour Fitness’ purported infringement of
 7 Defendants’ Marks, grant monetary damages, and cancel one or more of Plaintiff’s federal
 8 registrations.

9 24. To date, the parties have been unable to resolve their dispute.

10 25. On information and belief, 24 Hour Fitness’ use of the APEX trademark and/or Plaintiff’s
 11 Marks in connection with Plaintiff’s Goods and Services precedes Defendants’ first use and/or
 12 registration of one or more of its APEX marks in connection with such services.

13 **FIRST CLAIM FOR RELIEF**

14 **(Declaratory Relief – Noninfringement Of Trademark, 15 U.S.C. § 1125(a))**

15 26. 24 Hour Fitness realleges and incorporates by reference paragraphs 1 through 15 above.

16 27. As a result of Defendants’ actions, there is an actual controversy between Plaintiff and
 17 Defendants as to whether Plaintiff’s continued use of Plaintiff’s Marks is likely to cause mistake
 18 or to deceive as to the affiliation, connection or association between Defendants and Plaintiff, or
 19 as to the origin, sponsorship, or approval of Defendants’ goods or services or commercial
 20 activities by Plaintiff.

21 28. In light of Defendants’ assertion that Plaintiff’s use of its Apex marks is likely to cause
 22 confusion as to Defendants’ marks, 24 Hour Fitness has a reasonable and real apprehension that it
 23 faces an immediate lawsuit by Defendants, which lawsuit may affect its ability to use and or
 24 maintain registrations for Plaintiff’s Marks. In fact, after Plaintiff filed its original complaint in
 25 this action for declaratory relief on March 27, 2008, Defendants Apex, LLC and Apex at Home,
 26 LLC filed suit for trademark infringement against Plaintiff in their home forum of Rhode Island.

29. A judicial declaration pursuant to 28 U.S.C. §§ 2201 and 2202 is necessary and appropriate so that 24 Hour Fitness may ascertain its rights with respect to its continued use and registration of its marks.

PRAYER FOR RELIEF

30. WHEREFORE, 24 Hour Fitness prays for relief against Defendants as follows:

(a) A declaratory judgment that Plaintiff's use and registration of Plaintiff's Marks does not infringe on any of Defendants' Marks;

(b) Injunctive relief restraining Defendants, and their agents, successors and assigns, and all others acting in concert and privity with them, from bringing any lawsuit or threat against Plaintiff of trademark infringement or dilution in connection with Plaintiff's use and registration of Plaintiff's Marks;

(c) Plaintiff's costs and disbursements incurred in this action, including its reasonable attorneys' fees; and

(d) Such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

24 Hour Fitness USA, Inc. hereby demands a trial by jury of all issues triable by a jury.

Dated: June 3, 2008

MANATT, PHELPS & PHILLIPS, LLP

By: _____ //S// Britt L. Anderson
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Britt L. Anderson
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Fax: (650) 213-0260
Attorneys for Plaintiff
24 HOUR FITNESS USA, INC.

EXHIBIT 1



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Word Mark	APEX FIT
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Nutritional products, namely nutritional supplements and nutritionally fortified beverages; dietary supplements in the nature of nutritional bars and cookies; food supplements; meal replacement and dietary supplement drink mixes and powders; nutritional drink mix or powder for use as a meal replacement; vitamins. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	24.15.10 - Arrows, more than one; More than one arrow 24.15.25 - Other arrows 26.17.12 - Angles (geometric); Chevrons 27.03.01 - Geometric figures forming letters, numerals or punctuation
Serial Number	78440633
Filing Date	June 24, 2004
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	October 25, 2005
Registration Number	3045062
Registration Date	January 17, 2006
Owner	(REGISTRANT) Apex Fitness, Inc. CORPORATION CALIFORNIA 12647 Alcosta Boulevard, Suite 500 San Ramon CALIFORNIA 94583

(LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647
ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

**Assignment
Recorded**

ASSIGNMENT RECORDED

**Attorney of
Record**

the firm of Manatt, Phelps & Phillips, LLP, and, in particular, Susan E. Hollander, Esq. and Paul E. Thomas, Esq.

**Prior
Registrations**

1932876;2701627;2703428;AND OTHERS

Type of Mark

TRADEMARK

Register

PRINCIPAL

**Live/Dead
Indicator**

LIVE

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Word Mark APEX LEAN
Goods and Services IC 005. US 006 018 044 046 051 052. G & S: Nutritional products, namely nutritional supplements and nutritionally fortified beverages; dietary supplements in the nature of nutritional bars and cookies; food supplements; meal replacement and dietary supplement drink mixes and powders; nutritional drink mix or powder for use as a meal replacement; vitamins. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 26.17.12 - Angles (geometric); Chevrons
 27.03.01 - Geometric figures forming letters, numerals or punctuation

Serial Number 78440637

Filing Date June 24, 2004

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition October 4, 2005

Registration Number 3034722

Registration Date December 27, 2005

Owner (REGISTRANT) Apex Fitness, Inc. CORPORATION CALIFORNIA 12647 Alcosta Boulevard, Suite 500 San Ramon CALIFORNIA 94583

(LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647

ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

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Recorded**

ASSIGNMENT RECORDED

**Attorney of
Record**

the firm of Manatt, Phelps & Phillips, LLP, and, in particular, Susan E. Hollander, Esq. and Paul E. Thomas, Esq.

**Prior
Registrations**

1932876;2701627;2703428;AND OTHERS

Type of Mark

TRADEMARK

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FIX

Word Mark	APEX FIX
Goods and Services	IC 029. US 046. G & S: Food products, namely soy based food bars and cookies. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	24.15.04 - Arrowheads 24.15.10 - Arrows, more than one; More than one arrow 24.15.25 - Other arrows 26.17.12 - Angles (geometric); Chevrons 27.03.01 - Geometric figures forming letters, numerals or punctuation
Serial Number	78469695
Filing Date	August 18, 2004
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	July 12, 2005
Registration Number	3004281
Registration Date	October 4, 2005
Owner	(REGISTRANT) Apex Fitness, Inc. CORPORATION CALIFORNIA 12647 Alcosta Boulevard, Suite 500 San Ramon CALIFORNIA 94583 (LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647 ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

Assignment Recorded ASSIGNMENT RECORDED
Attorney of Record Paul E. Thomas,
Prior Registrations 1932876;2701627;2703428;AND OTHERS
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

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Word Mark	APEX FIX
Goods and Services	IC 030. US 046. G & S: Food products, namely grain based food bars and cookies. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	24.15.04 - Arrowheads 24.15.10 - Arrows, more than one; More than one arrow 24.15.25 - Other arrows 26.17.12 - Angles (geometric); Chevrons 27.03.01 - Geometric figures forming letters, numerals or punctuation
Serial Number	78469684
Filing Date	August 18, 2004
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	July 12, 2005
Registration Number	3004280
Registration Date	October 4, 2005
Owner	(REGISTRANT) Apex Fitness, Inc. CORPORATION CALIFORNIA 12647 Alcosta Boulevard, Suite 500 San Ramon CALIFORNIA 94583 (LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647 ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

Assignment Recorded ASSIGNMENT RECORDED
Attorney of Record Paul E. Thomas,
Prior Registrations 1932876;2701627;2703428;AND OTHERS
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

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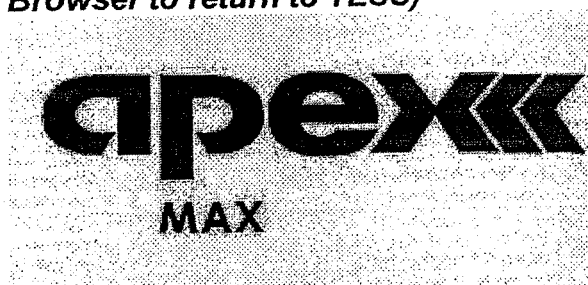
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TARR Status ASSIGN Status TDR TTAB Status (Use the "Back" button of the Internet Browser to return to TESS)



Word Mark APEX MAX
 Goods and Services IC 005. US 006 018 044 046 051 052. G & S: Nutritional products, namely nutritional supplements and nutritionally fortified beverages; dietary supplements in the nature of nutritional bars and cookies; food supplements; meal replacement and dietary supplement drink mixes and powders; nutritional drink mix or powder for use as a meal replacement; vitamins. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 26.17.12 - Angles (geometric); Chevrons
 27.03.01 - Geometric figures forming letters, numerals or punctuation

Serial Number 78440646

Filing Date June 24, 2004

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition June 28, 2005

Registration Number 2997642

Registration Date September 20, 2005

Owner (REGISTRANT) Apex Fitness, Inc. CORPORATION CALIFORNIA 12647 Alcosta Boulevard, Suite 500 San Ramon CALIFORNIA 94583

(LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647

ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

**Assignment
Recorded**

ASSIGNMENT RECORDED

**Attorney of
Record**

the firm of Manatt, Phelps & Phillips, LLP, and, in particular, Susan E. Hollander, Esq. and Paul E. Thomas, Esq.

Type of Mark

TRADEMARK

Register

PRINCIPAL

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apex

Word Mark
Goods and
Services

APEX

IC 005. US 006 018 044 046 051 052. G & S: nutritional and food supplements; vitamins and minerals; vitamin and mineral supplements. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701

IC 009. US 021 023 026 036 038. G & S: audio and visual recordings, namely, pre-recorded cassettes, videos, DVDs, and CD-ROMs in the field of health, fitness, or nutrition. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701

IC 016. US 002 005 022 023 029 037 038 050. G & S: Printed matter, namely books, instruction manuals, periodicals, brochures, and magazines in the field of health, fitness, or nutrition. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701

IC 035. US 100 101 102. G & S: Distributorship featuring vitamins & fitness programs. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701

IC 041. US 100 101 107. G & S: Instruction and training services in the field of fitness and nutrition. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701

IC 044. US 100 101. G & S: Providing information in the field of nutrition and fitness. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701

Mark Drawing
Code

(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search
Code

26.17.12 - Angles (geometric); Chevrons

Serial Number

73346264

Filing Date

December 29, 2003

Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition January 4, 2005
Registration Number 2936205
Registration Date March 29, 2005
Owner (REGISTRANT) Apex Fitness, Inc. CORPORATION CALIFORNIA 12647 Alcosta Blvd. 5th Flr. San Ramon CALIFORNIA 94583

(LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647 ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

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Word Mark	APEX FITNESS GROUP
Goods and Services	IC 035. US 100 101 102. G & S: Distributorships featuring vitamins and fitness programs in the form of licensed software, videotapes, and printed information. FIRST USE: 19990601. FIRST USE IN COMMERCE: 19990601
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.01.03 - Star - a single star with five points. 26.01.21 - Circles that are totally or partially shaded. 26.05.13 - Triangles, exactly two triangles; Two triangles 26.05.21 - Triangles that are completely or partially shaded
Serial Number	75849816
Filing Date	November 16, 1999
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 14, 2003
Registration Number	2703428
Registration Date	April 8, 2003
Owner	(REGISTRANT) APEX FITNESS, INC. CORPORATION CALIFORNIA 5020 FRANKLIN DRIVE PLEASANTON CALIFORNIA 94588 (LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647 ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

Assignment Recorded ASSIGNMENT RECORDED
Attorney of Record Susan E Hollander Esq
Prior Registrations 1932876
Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "FITNESS GROUP" APART FROM THE MARK AS SHOWN
Type of Mark SERVICE MARK
Register PRINCIPAL
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Word Mark	APEX FITNESS GROUP
Goods and Services	IC 009. US 021 023 026 036 038. G & S: Audio and visual recordings, namely, prerecorded cassettes, compact discs, videos, DVDs, and CD-ROMS in the field of health, fitness, or nutrition. FIRST USE: 19940131. FIRST USE IN COMMERCE: 19940131
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.01.02 - Star - a single star with four points 02.01.33 - Grotesque men formed by letters, numbers, punctuation or geometric shapes; Stick figures 04.07.02 - Objects forming a person; Person formed by objects 26.03.21 - Ovals that are completely or partially shaded 26.19.05 - Prisms ; Pyramids 26.19.25 - Geometric solids other than spheres, cylinders, cones, cube, prisms or pyramids
Serial Number	76422074
Filing Date	June 17, 2002
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 7, 2003
Registration Number	2702445
Registration Date	April 1, 2003
Owner	(REGISTRANT) Apex Fitness Group, Inc. CORPORATION CALIFORNIA 5020 Franklin Drive Pleasanton CALIFORNIA 94566

(LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647
ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

**Assignment
Recorded** ASSIGNMENT RECORDED

**Attorney of
Record** Susan E. Hollander, Esq.

**Prior
Registrations** 1932876

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Word Mark	APEX FITNESS GROUP
Goods and Services	IC 016. US 002 005 022 023 029 037 038 050. G & S: Printed matter, namely books, instruction manuals, periodicals, brochures, and magazines in the field of health, fitness, or nutrition. FIRST USE: 19940131. FIRST USE IN COMMERCE: 19940131
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.01.02 - Star - a single star with four points 02.01.33 - Grotesque men formed by letters, numbers, punctuation or geometric shapes; Stick figures 04.07.02 - Objects forming a person; Person formed by objects 26.03.21 - Ovals that are completely or partially shaded 26.19.05 - Prisms ; Pyramids 26.19.25 - Geometric solids other than spheres, cylinders, cones, cube, prisms or pyramids
Serial Number	76422068
Filing Date	June 17, 2002
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 7, 2003
Registration Number	2702444
Registration Date	April 1, 2003
Owner	(REGISTRANT) Apex Fitness Group, Inc. CORPORATION CALIFORNIA 5020 Franklin Drive Pleasanton CALIFORNIA 94566

(LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647
ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

**Assignment
Recorded** ASSIGNMENT RECORDED

**Attorney of
Record** Susan E. Hollander, Esq.

**Prior
Registrations** 1932876

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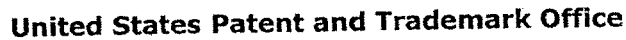
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Word Mark	APEX TRAINING SYSTEM
Goods and Services	IC 035. US 100 101 102. G & S: Distributorships featuring vitamins and fitness programs in the form of licensed software, videotapes, and printed information. FIRST USE: 19990601. FIRST USE IN COMMERCE: 19990601
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.01.03 - Star - a single star with five points 26.01.21 - Circles that are totally or partially shaded. 26.05.13 - Triangles, exactly two triangles; Two triangles 26.05.21 - Triangles that are completely or partially shaded
Serial Number	75849815
Filing Date	November 16, 1999
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 7, 2003
Registration Number	2701627
Registration Date	April 1, 2003
Owner	(REGISTRANT) APEX FITNESS, INC. CORPORATION CALIFORNIA 5020 FRANKLIN DRIVE PLEASANTON CALIFORNIA 94588 (LAST LISTED OWNER) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647 ALCOSTA BLVD, SUITE 500 SAN RAMON CALIFORNIA 94583

Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	William E. Levin
Prior Registrations	1932876
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "TRAINING SYSTEM" APART FROM THE MARK AS SHOWN
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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APEX FITNESS GROUP VIRTUAL GYM

Word Mark
Goods and
Services

APEX FITNESS GROUP VIRTUAL GYM

IC 041. US 100 101 107. G & S: Providing an on-line computer database featuring information regarding fitness services which allow users to create fitness programs; providing information in the field of fitness and bodybuilding; consultation services with personal trainers

IC 044. US 100 101. G & S: Providing information in the field of nutrition

Standard
Characters
Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Serial Number 78851695

Filing Date March 31, 2006

Current Filing Basis 1B

Original Filing Basis 1B

Published for Opposition June 19, 2007

Owner (APPLICANT) 24 HOUR FITNESS USA, INC. CORPORATION CALIFORNIA 12647 ALCOSTA BLVD. SUITE 500 SAN RAMON CALIFORNIA 94583

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Susan E. Hollander, Esq.

Prior 2702445;2703428;2936205

Disclaimer

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PRINCIPAL

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Typed Drawing

Word Mark	APEX
Goods and Services	IC 042. US 101. G & S: retail department store services. FIRST USE: 19420900. FIRST USE IN COMMERCE: 19420900
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	74430251
Filing Date	August 27, 1993
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	May 10, 1994
Registration Number	1847961
Registration Date	August 2, 1994
Owner	(REGISTRANT) Apex Incorporated CORPORATION RHODE ISLAND 100 Main Street Pawtucket RHODE ISLAND 02860

(LAST LISTED OWNER) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	JOHN E. OTTAVIANI,
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20040916.
Renewal	1ST RENEWAL 20040916
Live/Dead Indicator	LIVE

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Typed Drawing

Word Mark APEX
 Goods and Services IC 037, US 100 103 106. G & S: automotive repair and maintenance services. FIRST USE: 19240000. FIRST USE IN COMMERCE: 19240000

IC 042, US 100 101. G & S: retail automobile parts and accessories stores. FIRST USE: 19240000. FIRST USE IN COMMERCE: 19240000

Mark Drawing Code (1) TYPED DRAWING
 Serial Number 74529131
 Filing Date May 25, 1994
 Current Filing Basis 1A
 Original Filing Basis 1A
 Published for Opposition February 17, 1998
 Registration Number 2155905
 Registration Date May 12, 1998
 Owner (REGISTRANT) Apex Incorporated CORPORATION RHODE ISLAND 100 Main Street Pawtucket RHODE ISLAND 02860

(LAST LISTED OWNER) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

Assignment Recorded ASSIGNMENT RECORDED
 Attorney of Record JOHN E. OTTAVIANI
 Type of Mark SERVICE MARK
 Register PRINCIPAL
 Affidavit Text SECT 15, SECT 8 (6-YR).
 Live/Dead Indicator LIVE

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Typed Drawing

Word Mark APEX MALL
 Goods and Services IC 036. US 100 101 102. G & S: SHOPPING MALL SERVICES AND LEASING OF SHOPPING MALL SPACE.
 FIRST USE: 19660000. FIRST USE IN COMMERCE: 19660000
 Mark Drawing Code (1) TYPED DRAWING
 Serial Number 75836787
 Filing Date November 1, 1999
 Current Filing Basis 1A
 Original Filing Basis 1A
 Published for Opposition September 17, 2002
 Registration Number 2657639
 Registration Date December 10, 2002
 Owner (REGISTRANT) Apex Stores LLC CORPORATION RHODE ISLAND 100 Main Street Pawtucket RHODE ISLAND 02860

(LAST LISTED OWNER) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

Assignment Recorded ASSIGNMENT RECORDED
 Attorney of Record Lawrence R. Robins
 Prior Registrations 1847961
 Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MALL" APART FROM THE MARK AS SHOWN
 Type of Mark SERVICE MARK
 Register PRINCIPAL
 Live/Dead Indicator LIVE

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Word Mark	APEX STORES
Goods and Services	IC 035. US 100 101 102. G & S: Retail store, mail order purchase and computerized on-line retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, housewares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, giftware, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes, athletic footwear, novelties, food and Christmas items. FIRST USE: 19961101. FIRST USE IN COMMERCE: 19961101
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	75781412
Filing Date	August 23, 1999
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 23, 2001
Registration Number	2443933
Registration Date	April 17, 2001
Owner	(REGISTRANT) Apex Stores, LLC CORPORATION RHODE ISLAND 100 Main Street Pawtucket RHODE ISLAND 02860 (LAST LISTED OWNER) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	John E. Ottaviani
Prior Registrations	1847961;2155905
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "STORES" APART FROM THE MARK AS SHOWN
Type of Mark	SERVICE MARK
Register	PRINCIPAL

Trademark Electronic Search System (TESS)

Affidavit Text SECT 15. SECT 8 (6-YR).

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Typed Drawing

Word Mark APEX ONLINE

Goods and Services IC 035. US 100 101 102. G & S: Retail store, mail order purchase and computerized on-line retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, housewares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, giftware, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes, athletic footwear, novelties, food and Christmas items. FIRST USE: 19961101. FIRST USE IN COMMERCE: 19961101

Mark Drawing Code (1) TYPED DRAWING

Serial Number 75781411

Filing Date August 23, 1999

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition May 29, 2001

Registration Number 2562812

Registration Date April 23, 2002

Owner (REGISTRANT) Apex Stores, LLC CORPORATION RHODE ISLAND 100 Main Street Pawtucket RHODE ISLAND 02860

(LAST LISTED OWNER) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record John E. Ottaviani

Prior Registrations 1847961;2155905

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "ONLINE" APART FROM THE MARK AS SHOWN

Type of Mark SERVICE MARK

Register PRINCIPAL

Trademark Electronic Search System (TESS)

Affidavit Text SECT 15. SECT 8 (6-YR).

Live/Dead
Indicator LIVE

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Typed Drawing

Word Mark APEX ADVANTAGE
Goods and Services IC 040. US 100 103 106. G & S: CUSTOM FINISHING AND EMBELLISHMENT OF PROMOTIONAL ITEMS, NAMELY, EMBROIDERY, EMBOSSEING, ENGRAVING, CUSTOMIZED PRINTING, IMPRINTING, SCREEN PRINTING AND PAD PRINTING WITH COMPANY NAMES, LOGOS, MONOGRAMS, WORDS, AND/OR PICTURES FOR PROMOTIONAL AND ADVERTISING PURPOSES ON THE GOODS OF OTHERS, NAMELY, SPORTSWEAR, APPAREL AND OTHER PRODUCTS. FIRST USE: 19961201. FIRST USE IN COMMERCE: 20020901

Mark Drawing Code (1) TYPED DRAWING

Serial Number 78319107

Filing Date October 27, 2003

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition October 26, 2004

Registration Number 2918976

Registration Date January 18, 2005

Owner (REGISTRANT) Apex Stores, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

(LAST LISTED OWNER) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record JOHN E. OTTAVIANI

Prior Registrations 1847961;1956407;2155905;2443933;2562812;2657639;AND OTHERS

Type of Mark SERVICE MARK

Register PRINCIPAL

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APEX COMPANIES

Word Mark
Goods and
Services

APEX COMPANIES

IC 040. US 100 103 106. G & S: custom finishing and embellishment of promotional items, namely, embroidery, embossing, engraving, customized printing, imprinting, screen printing and pad printing with company names, logos, monograms, words, and/or pictures for promotional and advertising purposes on the goods of others, namely, sportswear, apparel and other products. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901

Standard
Characters
ClaimedMark Drawing
Code

(4) STANDARD CHARACTER MARK

Serial Number

78928036

Filing Date

July 12, 2006

Current Filing
Basis

1A

Original Filing
Basis

1A

Published for
Opposition

March 6, 2007

Registration
Number

3244685

Registration
Date

May 22, 2007

Owner

(REGISTRANT) Apex Stores, LLC LTD LIAB CO RHODE ISLAND 100 Main Street Pawtucket RHODE ISLAND 02860

(LAST LISTED OWNER) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

Assignment
Recorded

ASSIGNMENT RECORDED

Attorney of

John E. Ottaviani

Trademark Electronic Search System (TESS)

Record

Prior Registrations 2918976

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Type of Mark SERVICE MARK

Register PRINCIPAL

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Record 1 out of 1

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APEX COMPANIES

Word Mark APEX COMPANIES
Goods and Services IC 035. US 100 101 102. G & S: Promoting the goods and services of others by placing advertisements and promotional displays in an electronic site accessed through computer networks; providing an on-line advertising guide featuring the goods and services of others; electronic retailing services and ordering services via computer featuring a wide variety of merchandise; Retail store and advertising services, featuring a wide variety of merchandise; arranging for others the repair, service and replacement of a wide variety of general merchandise and vehicles; retail automobile parts and accessories stores; retail store services featuring customer pick-up and/or payment of newly purchased or repaired merchandise; pick up and delivery services; business, advertising, marketing and management consulting services. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901

IC 037. US 100 103 106. G & S: Automobile repair and maintenance. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901

Standard Characters Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Serial Number 78928022

Filing Date July 12, 2006

Current Filing Basis 1A

Original Filing Basis 1A

Owner (APPLICANT) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record John E. Ottaviani

Prior Registrations 1847961;2443933;2657639;2918976;AND OTHERS

Trademark Electronic Search System (TESS)

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Type of Mark SERVICE MARK
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APEX COMPANIES

Word Mark
Goods and
Services

APEX COMPANIES

IC 036. US 100 101 102. G & S: Shopping Mall services, namely leasing and management of shopping mall space; real estate management; financial services in the nature of investments and financing in the field of real estate, securities, debt, venture capital and loans. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901

IC 037. US 100 103 106. G & S: Real estate development. FIRST USE: 20020901. FIRST USE IN COMMERCE: 20020901

Standard
Characters
ClaimedMark Drawing
Code

(4) STANDARD CHARACTER MARK

Serial Number

78928052

Filing Date

July 12, 2006

Current Filing
Basis

1A

Original Filing
Basis

1A

Owner

(APPLICANT) APEX, LLC LTD LIAB CO RHODE ISLAND 100 MAIN STREET PAWTUCKET RHODE ISLAND 02860

Assignment
Recorded

ASSIGNMENT RECORDED

Attorney of
Record

John E. Ottaviani

Prior
Registrations

1847961;2443933;2657639;2918976;AND OTHERS

Disclaimer

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "COMPANIES" APART FROM THE MARK AS SHOWN

Type of Mark
RegisterSERVICE MARK
PRINCIPAL

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EXHIBIT 3

EDWARDS ANGELL PALMER & DODGE LLP

2800 Financial Plaza Providence, RI 02903 401.274.9200 fax 401.276.6611 eapdlaw.com

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New York, NY 10150

John E. Ottaviani
Phone: (401) 276-6405
Direct Fax: (888) 325.9049
jottaviani@eapdlaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

November 1, 2007

24-Hour Fitness USA, Inc.
12647 Alcosta Boulevard
Suite 500
San Ramon, CA 94583

Attention: President

RE: **Apex Stores, LLC v. 24-Hour Fitness USA, Inc.**
Cancellation Proceeding before the Trademark Trial and Appeal Board

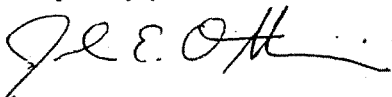
Ladies and Gentlemen:

I am enclosing a copy of a Petition for Cancellation that was filed against your company in the United States Patent and Trademark Office's Trademark Trial and Appeal Board today. The Petition requests cancellation of Registration No. 2,701,627 for the mark APEX TRAINING SYSTEM; Registration No. 2,703,428 for the mark APEX FITNESS GROUP and Registration No. 2,036,205 for the mark APEX, all as they relate to services in Class 35. The Patent and Trademark Office rules require that we serve a copy of this Petition on you as the owner of record of this registration.

Should you wish to speak directly with our client, please contact Mr. Andrew Gates at (401) 729-7200, ext. 7201.

Otherwise, you and your attorneys should be aware that an answer to this Petition for Cancellation should be filed with the Trademark Trial and Appeal Board within forty (40) days.

Very truly yours,



John E. Ottaviani

Enclosure

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Registration No. 2,701,627
Date of Issue: April 1, 2003

In the matter of Registration No. 2,703,428
Date of Issue: April 8, 2003

In the matter of Registration No. 2,936,205
Date of Issue: March 29, 2005

APEX STORES, LLC

Petitioner

V.

24 HOUR FITNESS USA, INC.

Registrant

Cancellation No.:

CONSOLIDATED PETITION FOR CANCELLATION

Apex Stores, LLC, a limited liability company organized and existing under the laws of the State of Rhode Island, having a business address of 100 Main Street, Pawtucket, Rhode Island 02860 ("Apex"), believes that it will be damaged by Registration No. 2,703,428 for the mark APEX FITNESS GROUP (and design) and Registration No. 2,701,627 for the mark APEX TRAINING SYSTEM (and design) as they relate to services in Class 35, namely distributorships featuring vitamins and fitness programs in the form of licensed software, videotapes, and printed information, and by Registration No. 2,936,205 for the mark APEX (in stylized form) as it relates to services in Class 35, namely distributorship featuring vitamins and fitness programs, and hereby petitions to cancel the registrations of the said marks for these services.

As grounds for this Petition, Apex avers that:

Apex and its Marks

1. Since at least as early as 1924, Apex and its predecessors have used the mark "APEX" and other marks incorporating the word "APEX" on and in connection with various manufacturing, wholesale, retail, on-line retail, commercial and residential real estate development, real estate management and advertising businesses.
2. Apex is the owner of common law rights in the marks APEX, APEX ONLINE and APEX STORES, as a result of the continuous use of the APEX mark since at least as early as 1924 in connection with automotive repair and maintenance services and retail automobile parts and accessories store services, as a result of its continuous use of the APEX mark since at least as early as September 1942 for retail department store services, and as a result of its continuous use of the APEX ONLINE and APEX STORES marks since at least as early as November 1996 in connection with retail store, mail order purchase and computerized online retail services.
3. Apex owns the following U.S. registrations for its trademarks and service marks, among others:

<u>Mark</u>	<u>Registration No.</u>	<u>Issue Date</u>	<u>Goods and Services</u>
APEX	1,847,961	8/2/1994	Retail department store services (Class 42)
APEX	2,155,905	5/12/1998	Automotive repair and maintenance (Class 37); retail automobile parts and accessories stores (Class 42)
APEX ONLINE	2,562,812	4/23/2002	Retail store, mail order purchase and computerized online retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, house wares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power

<u>Mark</u>	<u>Registration No.</u>	<u>Issue Date</u>	<u>Goods and Services</u>
			equipment, electronics, photography, jewelry, cosmetics, toys, giftware, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes athletic foot wear, novelties, food and Christmas items (Class 35)
APEX MALL	2,657,639	12/10/2002	Shopping mall services and leasing of shopping mall space (Class 36)
APEX STORES	2,443,933	4/17/2001	Retail store, mail order purchase and computerized online retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, house wares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, giftware, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes athletic foot wear, novelties, food and Christmas items (Class 35)
APEX ADVANTAGE	2,918,976	1/18/2005	Custom finishing and embellishment of promotional items, namely, embroidery, embossing, engraving customized printing, imprinting, screen printing and pad printing with company names, logos, monograms, words and/or pictures for promotional and advertising purposes on the goods of others, namely, sportswear, apparel and other products (Class 40)
APEX COMPANIES	3,244,685	5/22/2007	Custom finishing and embellishment of promotional items, namely, embroidery, embossing, engraving customized printing, imprinting, screen printing and pad printing with

<u>Mark</u>	<u>Registration No.</u>	<u>Issue Date</u>	<u>Goods and Services</u>
			company names, logos, monograms, words and/or pictures for promotional and advertising purposes on the goods of others, namely, sportswear, apparel and other products (Class 40)

Current printouts of information from the TARR electronic database records of the U.S. Patent and Trademark Office showing the current status and title of each registration are attached to this Petition as Exhibits "A" through "G" respectively.

4. Registration No. 1,847,961 for the mark APEX has been renewed pursuant to the provisions of the Lanham Act, and is incontestable.

5. Registration No. 2,155,905 for the mark APEX, Registration No. 2,562,812 for the mark APEX ONLINE and Registration No. 2,443,933 for the mark APEX STORES are incontestable.

6. Apex is the owner of U.S. Application Serial No. 78/928022 to register APEX COMPANIES as a service mark for the following services: "promoting the goods and services of others by placing advertisements and promotional displays in an electronic site accessed through computer networks; providing an on-line advertising guide featuring the goods and services of others; electronic retailing services and ordering services via computer featuring a wide variety of merchandise; Retail store and advertising services, featuring a wide variety of merchandise; arranging for others the repair, service and replacement of a wide variety of general merchandise and vehicles; retail automobile parts and accessories stores; retail store services featuring customer pick-up and/or payment of newly purchased or repaired merchandise; pick up

and delivery services; business, advertising, marketing and management consulting services" in Class 35; and for "automobile repair and maintenance" in Class 37.

Registrant and its Marks

7. Upon information and belief, 24 Hour Fitness USA, Inc. ("Registrant") is a California corporation with offices at 12647 Alcosta Boulevard, Suite 500, San Ramon, California 94583.

8. Registrant is the record owner of the following U.S. Trademark Registration for the mark APEX TRAINING SYSTEM (and design):

<u>Registration No.</u>	<u>Issue Date</u>	<u>Goods and Services</u>
2,701,627	4/1/2003	Distributorships featuring vitamins and fitness programs in the form of licensed software, videotapes, and printed information

9. Registrant is the record owner of the following U.S. Trademark Registration for the mark APEX FITNESS GROUP (and design):

<u>Registration No.</u>	<u>Issue Date</u>	<u>Goods and Services</u>
2,703,428	4/8/2003	Distributorships featuring vitamins and fitness programs in the form of licensed software, videotapes, and printed information (Class 35)

10. Registrant is the record owner of the following U.S. Trademark Registration for the mark APEX (stylized):

<u>Registration No.</u>	<u>Issue Date</u>	<u>Goods and Services</u>
2,036,205	3/29/2005	Distributorships featuring vitamins and fitness programs (Class 35), and various other services in five other classes.

COUNT I: LIKELIHOOD OF CONFUSION

11. Apex repeats and incorporates herein by reference the averments in the preceding paragraphs.

12. Registrant's APEX FITNESS GROUP, APEX TRAINING SYSTEM and APEX marks are very similar in appearance and commercial impression to Apex's APEX, APEX ONLINE and APEX STORES marks.

13. The distributorship services listed in Registration No. 2,701,627, Registration No. 2,703,428 and Registration No. 2,936,205 are closely related to those of Apex, in particular, to Apex's retail store, mail order purchase and computerized online retail services.

14. On information and belief, Apex is the prior user of the APEX mark. Apex began using APEX in connection with retail department store services at least as early as September 1942, and began using APEX ONLINE and APEX STORES in connection with retail store, mail order purchase and computerized online retail services at least as early as November 1996. Registrant's registrations state that Registrant first used its APEX TRAINING SYSTEM and APEX FITNESS GROUP marks for distributorships featuring vitamins and fitness programs in the form of licensed software, videotapes and printed information on June 1, 1999, and that Registrant first used its APEX mark for distributorships featuring vitamins and fitness programs on July 1, 2003. Consequently, Registrant's date of first use for each of these marks is subsequent to Apex's actual date of first use of its APEX, APEX ONLINE and APEX STORES mark for the identical or closely related services.

15. Apex has expended considerable effort and expense in promoting its APEX, APEX ONLINE and APEX STORES service marks and the goods and the services sold under

such marks, with the result that the purchasing public has come to know, rely upon and recognize the products and services of Apex by such marks.

16. Registrant's APEX TRAINING SYSTEM, APEX FITNESS GROUP and APEX service marks are confusingly similar to Apex's APEX, APEX ONLINE and APEX STORES service marks and are likely to cause confusion, deception or mistake to Apex's irreparable damage and injury, in violation of Section 2(d) of the Lanham Act, 15 USC §1052(d).

17. If Registrant is permitted to retain the registrations sought to be cancelled, and thereby the prima facie exclusive right to use in commerce the APEX TRAINING SYSTEM, APEX FITNESS GROUP and APEX mark on the identical or closely related services offered by Apex, a cloud will be placed on Apex's title to its trademarks, APEX, APEX ONLINE and APEX STORES and Apex's right to enjoy the full and exclusive use of the APEX, APEX ONLINE and APEX STORES marks in the United States in connection with the promotion of its services.

18. If Registrant is permitted to retain the registrations sought to be cancelled, Apex has been advised by the U.S. Patent and Trademark Office that Apex's pending application Serial No. 78/928022 to register the service mark APEX COMPANIES as a service mark for its services may be refused.

Oct 31 07 03:31p

APEX

(401) 723-9452

p. 2

COUNT II: DILUTION

18. Apex repeats and incorporates herein reference the averments in the preceding paragraphs.

19. Apex is damaged and will continue to be damaged because Registrant's continued use and registration of the APEX TRAINING SYSTEM, APEX FITNESS GROUP and APEX marks dilute the distinctive quality of Apex's APEX, APEX STORES and APEX ONLINE service marks.

PRAYER FOR RELIEF

WHEREFORE, Apex respectfully requests that Registration No. 2,701,627, Registration No. 2,703,428 and Registration No. 2,936,205 be cancelled as they relate to services in Class 35.

The filing fee of \$[900] for this Petition to Cancel is being submitted electronically with this Petition.

Apex hereby appoints John E. Ottaviani, of the law firm of Edwards Angell Palmer & Dodge LLP, a member of the bars of the State of Rhode Island and the Commonwealth of Massachusetts, as its attorney with full power of substitution and revocation, to prosecute this cancellation proceeding, and to transact all business in the U.S. Patent and Trademark Office in connection herewith.

APEX STORES, LLC

By: 

Andrew A. Gates, Manager

Dated: October 31, 2007

Oct 31 07 03:28p

APEX

(401) 723-9452

p.3

STATE OF RHODE ISLAND

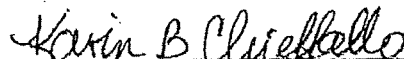
COUNTY OF PROVIDENCE

Andrew A. Gates, hereby duly sworn, deposes and says that he is a Manager of Apex Stores, LLC and is authorized to execute this document on behalf of said corporation; that he has read and signed the same and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes them to be true.



Andrew A. Gates, Manager

Subscribed and sworn to, before me this 31st day of October, 2007.


Notary Public ID# 48663

My commission expires: 9-6-2009

KARIN B. CHIEFFALLO
Notary Public, State of Rhode Island
My Commission Expires Sept. 6, 2009

Latest Status Info

EXHIBIT "A"

Page 1 of 3

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-10-15 15:56:09 ET

Serial Number: 74430251 Assignment Information Trademark Document Retrieval

Registration Number: 1847961

Mark (words only): APEX

Standard Character claim: No

Current Status: This registration has been renewed.

Date of Status: 2004-09-16

Filing Date: 1993-08-27

Transformed into a National Application: No

Registration Date: 1994-08-02

Register: Principal

Law Office Assigned: LAW OFFICE 3

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2004-09-20

LAST APPLICANT(S)/OWNER(S) OF RECORD

APEX STORES, LLC

Address:

APEX STORES, LLC
10 MAIN STREET
PAWTUCKET, RI 02860
United States

Legal Entity Type: Ltd Liab Co

Date or Country Where Organized: Rhode Island

GOODS AND/OR SERVICES

International Class: 042

Class Status: Active

Latest Status Info

Page 2 of 3

etail department store services

basis: 1(a)

First Use Date: 1942-09-00

First Use in Commerce Date: 1942-09-00

ADDITIONAL INFORMATION

NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

NOT AVAILABLE)

PROSECUTION HISTORY

004-09-16 - First renewal 10 year

004-09-16 - Section 8 (10-year) accepted/ Section 9 granted

004-07-22 - Combined Section 8 (10-year)/Section 9 filed

004-07-22 - TEAS Section 8 & 9 Received

004-01-26 - TEAS Change Of Correspondence Received

003-08-28 - TEAS Change Of Correspondence Received

000-10-17 - Section 8 (6-year) accepted & Section 15 acknowledged

000-06-30 - Section 8 (6-year) and Section 15 Filed

994-08-02 - Registered - Principal Register

994-05-10 - Published for opposition

994-04-08 - Notice of publication

994-01-18 - Approved for Pub - Principal Register (Initial exam)

994-01-06 - Examiner's amendment mailed

994-01-04 - Assigned To Examiner

993-12-22 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

atest Status Info

Page 3 of 3

JOHN E. OTTAVIANI,

Correspondent

JOHN E. OTTAVIANI,
DWARDS & ANGELL, LLP
PO BOX 55874
BOSTON MA 02205
Phone Number: 401-274-9200
Fax Number: 401-276-6611

USPTO Assignments on the Web

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Assignments on the Web > Trademark Query

Trademark Assignment Abstract of Title

Total Assignments: 1

Serial #: 74430251

Filing Dt: 08/27/1993

Reg #: 1847961

Reg. Dt: 08/02/1994

Registrant: Apex Incorporated

Mark: APEX

Assignment: 1

Reel/Frame: 2110/0428

Received: 07/28/2000

Recorded: 07/03/2000

Pages: 4

Conveyance: ASSIGNS THE ENTIRE INTEREST

Assignor: APEX INCORPORATED

Exec Dt: 06/08/2000

Entity Type: CORPORATION

Citizenship: RHODE ISLAND

Entity Type: CORPORATION

Citizenship: RHODE ISLAND

Assignee: APEX STORES, LLC

100 MAIN STREET

PAWTUCKET, RHODE ISLAND 02860

Correspondent: HINCKLEY, ALLEN & SNYDER LLP

LAWRENCE R. ROBINS

28 STATE STREET

BOSTON, MA 02109

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350, v.2.0.1
Web interface last modified: April 20, 2007 v.2.0.1

Search Results as of: 10/15/2007 03:55 PM

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EXHIBIT "B"

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Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-10-15 15:56:41 ET

Serial Number: 74529131 Assignment Information Trademark Document Retrieval

Registration Number: 2155905

Mark (words only): APEX

Standard Character claim: No

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 2004-06-02

Filing Date: 1994-05-25

Transformed into a National Application: No

Registration Date: 1998-05-12

Register: Principal

Law Office Assigned: LAW OFFICE 106

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2004-06-04

LAST APPLICANT(S)/OWNER(S) OF RECORD

APEX STORES, LLC

Address:

APEX STORES, LLC
10 MAIN STREET
PAWTUCKET, RI 02860
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Rhode Island

GOODS AND/OR SERVICES

International Class: 037

Class Status: Active

Latest Status Info

Page 2 of 3

Automotive repair and maintenance services

Basis: 1(a)

First Use Date: 1924-00-00

First Use in Commerce Date: 1924-00-00

International Class: 042

Class Status: Active

Retail automobile parts and accessories stores

Basis: 1(a)

First Use Date: 1924-00-00

First Use in Commerce Date: 1924-00-00

ADDITIONAL INFORMATION

NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

NOT AVAILABLE)

PROSECUTION HISTORY

1004-06-02 - Section 8 (6-year) accepted & Section 15 acknowledged

1004-05-12 - Response received for Post Registration action

1004-05-12 - Section 8 (6-year) and Section 15 Filed

1004-05-12 - TEAS Response to Office Action Received

1004-05-12 - TEAS Section 8 & 15 Received

1004-02-17 - Post Registration action mailed Section 8 & 15

1004-01-26 - TEAS Change Of Correspondence Received

1003-12-15 - Section 8 (6-year) and Section 15 Filed

1003-12-15 - TEAS Section 8 & 15 Received

1003-08-28 - TEAS Change Of Correspondence Received

1098-05-12 - Registered - Principal Register

1098-02-17 - Published for opposition

1098-02-17 - Published for opposition

1098-01-16 - Notice of publication

atest Status Info

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997-12-10 - Approved for Pub - Principal Register (Initial exam)

997-08-11 - Communication received from applicant

996-12-04 - Letter of suspension mailed

996-10-28 - Communication received from applicant

996-04-25 - Final refusal mailed

995-12-14 - Communication received from applicant

995-07-15 - Letter of suspension mailed

995-07-13 - Assigned To Examiner

995-05-14 - Communication received from applicant

994-11-17 - Non-final action mailed

994-10-19 - Assigned To Examiner

994-10-17 - Assigned To Examiner

994-10-17 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

JOHN E. OTTAVIANI

Correspondent

JOHN E. OTTAVIANI

EDWARDS & ANGELL, LLP

PO BOX 55874

BOSTON MA 02205

Phone Number: 401-274-9200

Fax Number: 401-276-6611

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Assignments on the Web > Trademark Query

Trademark Assignment Abstract of Title

Total Assignments: 1

Serial #: 74529131

Filing Dt: 05/25/1994

Reg #: 2155905

Reg. Dt: 05/12/1998

Registrant: Apex Incorporated

Mark: APEX

Assignment: 1

Reel/Frame: 2110/0428

Received: 07/28/2000

Recorded: 07/03/2000

Pages: 4

Conveyance: ASSIGNS THE ENTIRE INTEREST

Assignor: APEX INCORPORATED

Exec Dt: 06/08/2000

Entity Type: CORPORATION

Citizenship: RHODE ISLAND

Entity Type: CORPORATION

Citizenship: RHODE ISLAND

Assignee: APEX STORES, LLC

100 MAIN STREET

PAWTUCKET, RHODE ISLAND 02860

Correspondent: HINCKLEY, ALLEN & SNYDER LLP

LAWRENCE R. ROBINS

28 STATE STREET

BOSTON, MA 02109

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.0.1
Web interface last modified: April 20, 2007 v.2.0.1

Search Results as of: 10/15/2007 03:56 PM

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EXHIBIT "C"

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Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-10-15 15:57:05 ET

Serial Number: 75781411 Assignment Information Trademark Document Retrieval

Registration Number: 2562812

Mark (words only): APEX ONLINE

Standard Character claim: No

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 2007-09-13

Filing Date: 1999-08-23

Transformed into a National Application: No

Registration Date: 2002-04-23

Register: Principal

Law Office Assigned: LAW OFFICE 103

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 830 -Post Registration

Date In Location: 2007-09-13

LAST APPLICANT(S)/OWNER(S) OF RECORD

Apex Stores, LLC

Address:

Apex Stores, LLC

100 Main Street

Wawtucket, RI 02860

United States

Legal Entity Type: Corporation

State or Country of Incorporation: Rhode Island

GOODS AND/OR SERVICES

International Class: 035

Class Status: Active

Latest Status Info

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etail store, mail order purchase and computerized on-line retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, housewares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, software, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes, athletic footwear, novelties, food and Christmas items

Basis: 1(a)

First Use Date: 1996-11-01

First Use in Commerce Date: 1996-11-01

ADDITIONAL INFORMATION

Disclaimer: "ONLINE"

Prior Registration Number(s):

847961

155905

MADRID PROTOCOL INFORMATION

NOT AVAILABLE)

PROSECUTION HISTORY

007-09-13 - Section 8 (6-year) accepted & Section 15 acknowledged

007-09-12 - Assigned To Paralegal

007-08-28 - Section 8 (6-year) and Section 15 Filed

007-08-28 - TEAS Section 8 & 15 Received

007-05-04 - Case File In TICRS

004-01-26 - TEAS Change Of Correspondence Received

003-08-28 - TEAS Change Of Correspondence Received

002-04-23 - Registered - Principal Register

001-06-28 - Extension Of Time To Oppose Received

001-05-29 - Published for opposition

001-05-16 - Notice of publication

001-01-29 - Approved for Pub - Principal Register (Initial exam)

000-07-25 - Letter of suspension mailed

Latest Status Info

Page 3 of 3

2000-06-30 - Communication received from applicant

2000-01-31 - Non-final action mailed

2000-01-19 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

John E. Ottaviani

Correspondent

John E. Ottaviani

Edwards Angell Palmer & Dodge LLP

P.O. Box 130

F.D.R. Station

New York NY 10150

Phone Number: 401-274-9200

Fax Number: 401-276-6611

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For Serial Number: 75781411

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Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-10-15 15:57:28 ET

Serial Number: 75836787 Assignment Information Trademark Document Retrieval

Registration Number: 2657639

Mark (words only): APEX MALL

Standard Character claim: No

Current Status: Registered.

Date of Status: 2002-12-10

Filing Date: 1999-11-01

Transformed into a National Application: No

Registration Date: 2002-12-10

Register: Principal

Law Office Assigned: LAW OFFICE 103

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2003-01-28

LAST APPLICANT(S)/OWNER(S) OF RECORD

Apex Stores LLC

Address:

Apex Stores LLC

100 Main Street

Wawtucket, RI 02860

United States

Legal Entity Type: Corporation

State or Country of Incorporation: Rhode Island

GOODS AND/OR SERVICES

International Class: 036

Class Status: Active

10/15/2007

Latest Status Info

Page 2 of 3

HOPPING MALL SERVICES AND LEASING OF SHOPPING MALL SPACE

basis: 1(a)

First Use Date: 1966-00-00

First Use in Commerce Date: 1966-00-00

ADDITIONAL INFORMATION

Disclaimer: "MALL"

Prior Registration Number(s):

847961

MADRID PROTOCOL INFORMATION

NOT AVAILABLE)

PROSECUTION HISTORY

2004-01-26 - TEAS Change Of Correspondence Received

2003-08-28 - TEAS Change Of Correspondence Received

2002-12-10 - Registered - Principal Register

2002-09-17 - Published for opposition

2002-08-28 - Notice of publication

2002-05-14 - Approved for Pub - Principal Register (Initial exam)

2002-05-09 - Examiner's amendment mailed

2002-04-01 - Communication received from applicant

2002-04-01 - PAPER RECEIVED

2001-10-09 - Non-final action mailed

2000-10-27 - Letter of suspension mailed

2000-10-25 - Assigned To Examiner

2000-09-15 - Communication received from applicant

2000-03-14 - Non-final action mailed

2000-03-09 - Assigned To Examiner

2000-03-08 - Assigned To Examiner

Latest Status Info

Page 3 of 3

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

Lawrence R. Robins

Correspondent

JOHN E. OTTAVIANI, ESQ.

DWARDS & ANGELL, LLP

PO BOX 55874

BOSTON MA 02205

Phone Number: 401-274-9200

Fax Number: 401-276-6611

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For Serial Number: 75836787

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Web interface last modified: April 20, 2007 v.2.0.1

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Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-10-15 15:57:52 ET

Serial Number: 75781412 Assignment Information Trademark Document Retrieval

Registration Number: 2443933

Mark (words only): APEX STORES

Standard Character claim: No

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 2007-05-21

Filing Date: 1999-08-23

Transformed into a National Application: No

Registration Date: 2001-04-17

Register: Principal

Law Office Assigned: LAW OFFICE 103

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 830 -Post Registration

Date In Location: 2007-05-21

LAST APPLICANT(S)/OWNER(S) OF RECORD

Apex Stores, LLC

Address:

Apex Stores, LLC

100 Main Street

Providence, RI 02860

United States

Legal Entity Type: Corporation

State or Country of Incorporation: Rhode Island

GOODS AND/OR SERVICES

International Class: 035

Class Status: Active

Latest Status Info

Page 2 of 3

etail store, mail order purchase and computerized on-line retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, housewares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, software, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes, athletic footwear, novelties, food and Christmas items

Basis: 1(a)

First Use Date: 1996-11-01

First Use in Commerce Date: 1996-11-01

ADDITIONAL INFORMATION

Disclaimer: "STORES"

Prior Registration Number(s):

847961

155905

MADRID PROTOCOL INFORMATION

NOT AVAILABLE)

PROSECUTION HISTORY

007-05-21 - Section 8 (6-year) accepted & Section 15 acknowledged

007-05-15 - Assigned To Paralegal

007-04-17 - Section 8 (6-year) and Section 15 Filed

007-04-17 - TEAS Section 8 & 15 Received

006-11-21 - Case File In TIGRS

004-01-26 - TEAS Change Of Correspondence Received

003-08-28 - TEAS Change Of Correspondence Received

001-04-17 - Registered - Principal Register

001-01-23 - Published for opposition

000-12-22 - Notice of publication

000-11-08 - Approved for Pub - Principal Register (Initial exam)

000-11-08 - Assigned To Examiner

000-07-25 - Letter of suspension mailed

Latest Status Info

Page 3 of 3

000-06-30 - Communication received from applicant

000-01-31 - Non-final action mailed

000-01-19 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

John E. Ottaviani

Correspondent

John E. Ottaviani

Edwards Angell Palmer & Dodge LLP

P.O. Box 130

J.D.R. Station

New York NY 10150

Phone Number: 401-274-9200

Fax Number: 401-276-6611

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No assignment has been recorded at the USPTO

For Serial Number: 75781412

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Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-10-15 15:58:19 ET

Serial Number: 78319107 Assignment Information Trademark Document Retrieval

Registration Number: 2918976

Mark (words only): APEX ADVANTAGE

Standard Character claim: No

Current Status: Registered.

Date of Status: 2005-01-18

Filing Date: 2003-10-27

Transformed into a National Application: No

Registration Date: 2005-01-18

Register: Principal

Law Office Assigned: LAW OFFICE 102

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 650 -Publication And Issue Section

Date In Location: 2005-01-18

LAST APPLICANT(S)/OWNER(S) OF RECORD

Apex Stores, LLC

Address:

Apex Stores, LLC
100 MAIN STREET
PAWTUCKET, RI 02860
United States

Legal Entity Type: Ltd Liab Co

Date or Country Where Organized: Rhode Island

GOODS AND/OR SERVICES

International Class: 040

Class Status: Active

Latest Status Info

Page 2 of 3

CUSTOM FINISHING AND EMBELLISHMENT OF PROMOTIONAL ITEMS, NAMELY, EMBROIDERY, EMBOSSED, ENGRAVING, CUSTOMIZED PRINTING, IMPRINTING, SCREEN PRINTING AND PAD PRINTING WITH COMPANY NAMES, LOGOS, MONOGRAMS, WORDS, AND/OR PICTURES FOR PROMOTIONAL AND ADVERTISING PURPOSES ON THE GOODS OF OTHERS, NAMELY, SPORTSWEAR, APPAREL AND OTHER PRODUCTS

Basis: 1(a)

First Use Date: 1996-12-01

First Use in Commerce Date: 2002-09-01

ADDITIONAL INFORMATION

Prior Registration Number(s):

847961
956407
155905
443933
562812
657639

MADRID PROTOCOL INFORMATION

NOT AVAILABLE)

PROSECUTION HISTORY

005-11-17 - TEAS Change Of Correspondence Received
005-01-18 - Registered - Principal Register
004-10-26 - Published for opposition
004-10-06 - Notice of publication
004-08-30 - PAPER RECEIVED
004-09-07 - Published for opposition
004-08-30 - FAX RECEIVED
004-08-18 - Notice of publication
004-07-22 - TEAS Response to Office Action Received
004-05-31 - Approved for Pub - Principal Register (Initial exam)
004-05-27 - Examiners amendment e-mailed
004-05-11 - Assigned To Examiner

Latest Status Info

Page 3 of 3

2004-01-26 - TEAS Change Of Correspondence Received

2003-11-20 - New Application Entered In Tram

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

JOHN E. OTTAVIANI

Correspondent

John E. Ottaviani, Esq.

Edwards Angell Palmer & Dodge, LLP

P.O. Box 55874

Boston MA 02205

Phone Number: 401-274-9200

Fax Number: 401-276-6611

USPTO Assignments on the Web

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Assignments on the Web > Trademark Query

No assignment has been recorded at the USPTO

For Serial Number: 78319107

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.0.1
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Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-10-15 15:58:48 ET

Serial Number: 78928036 Assignment Information Trademark Document Retrieval

Registration Number: 3244685

Mark

APEX COMPANIES

Words only): APEX COMPANIES

Standard Character claim: Yes

Current Status: Registered.

Date of Status: 2007-05-22

Filing Date: 2006-07-12

Transformed into a National Application: No

Registration Date: 2007-05-22

Register: Principal

Law Office Assigned: LAW OFFICE 111

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 650 -Publication And Issue Section

Date In Location: 2007-05-22

LAST APPLICANT(S)/OWNER(S) OF RECORD

Apex Stores, LLC

Address:

Apex Stores, LLC

10 Main Street

Latest Status Info

Page 2 of 3

Providence, RI 02860
United States
Legal Entity Type: Ltd Liab Co
State or Country Where Organized: Rhode Island

GOODS AND/OR SERVICES

International Class: 040
Class Status: Active
Custom finishing and embellishment of promotional items, namely, embroidery, embossing, engraving, customized printing, imprinting, screen printing and pad printing with company names, logos, monograms, words, and/or pictures for promotional and advertising purposes on the goods of others, namely, sportswear, apparel and other products
Basis: 1(a)
First Use Date: 2002-09-01
First Use in Commerce Date: 2002-09-01

ADDITIONAL INFORMATION

Disclaimer: "COMPANIES"

Prior Registration Number(s):
018976

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

07-05-22 - Registered - Principal Register
07-03-06 - Published for opposition
07-02-14 - Notice of publication
07-01-12 - Law Office Publication Review Completed
07-01-12 - Assigned To LIE
06-12-16 - Approved for Pub - Principal Register (Initial exam)
06-12-14 - Examiner's Amendment Entered
06-12-14 - Examiners amendment e-mailed
06-12-14 - Examiners Amendment - Written
06-12-11 - Assigned To Examiner

atest Status Info

Page 3 of 3

006-07-18 - New Application Entered In Tram

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

John E. Ottaviani

Correspondent

JOHN E. OTTAVIANI

DWARDS ANGELL PALMER & DODGE LLP

PO BOX 55874

BOSTON, MA 02205-5874

Phone Number: 401-274-9200

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Assignments on the Web > Trademark Query

No assignment has been recorded at the USPTO

For Serial Number: 78928036

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.0.1
Web interface last modified: April 20, 2007 v.2.0.1

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EXHIBIT 4

EDWARDS ANGELL PALMER & DODGE LLP

2800 Financial Plaza Providence, RI 02903 401.274.9200 fax 401.276.6611 eapdlaw.com

F.D.R. Station
P.O. Box 130
New York, NY 10150

John E. Ottaviani
401.276.6405
fax 888.325.9049
jottaviani@eapdlaw.com

CONFIDENTIAL **FOR SETTLEMENT PURPOSES ONLY**

March 10, 2008

Christine M. Klenk, Esq.
Manatt Phelps Phillips
1001 Page Mill Road, Bldg. 2
Palo Alto, CA 94304

Re **Apex Stores, LLC v. 24-Hour Fitness USA, Inc.**
TTAB Cancellation Proceeding No. 9204878

Dear Christine:

We have had an opportunity to discuss this matter at length with our client and are responding to your inquiry as to whether we could settle this matter with a Letter of Consent. At this point, our client's position is that a Letter of Consent will not be sufficient to resolve the outstanding issues.

By way of background, our client is part of a group of Apex businesses run by the same family since Apex's inception in 1924. The Apex businesses engage in a variety of activities, including, manufacturing, retail, online retail, automotive tire, repair and service, real estate development and management, and financial services, among many others.

The trademark "APEX" is derived from the initials of the founder of Apex, Albert Pilavin. Having used "Apex" extensively for almost a century, and having invested in excess of tens of millions of dollars in advertising and promoting the mark over the past 84 years, the Apex Companies and the family that owns them have a great deal of emotional as well as financial investment in the "APEX" trademark. The retail businesses, including the online and physical retail businesses, are a long standing tradition. Our client has also made extensive use of the APEX mark for its Apex credit card and customer loyalty programs, among other things, associated with its retail services throughout the U.S. Historically, our client has also operated various retail stores under the name "APEX," including department stores, specialty stores, automotive stores and various websites, from which it sells a very wide variety of merchandise, including health and fitness clothing and equipment, health and beauty items and food.

EDWARDS ANGELL PALMER & DODGE LLP

Christine Klenk

March 10, 2008

Page 2

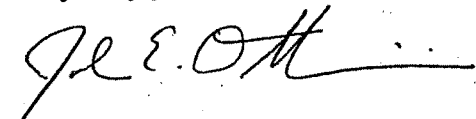
Our client was not aware of your client's use of the Apex Fitness mark, and, in fact, did not know your client existed, until very recently. Our client is concerned, not only with your client's use of "APEX" and "APEX FITNESS" for retail sales of nutrition supplements and foods and exercise programs, but also that your client's mark looks very much like variations of our client's mark and that your client seems to be expanding its use of the term Apex and using it in very similar ways to our client. Given our client's use of the trademark "APEX" for over 84 years for retail sales and online sales, and its prior use of its APEX mark in connection with the sale of health and fitness products, our client is unwilling to compromise its significant history and the investment it has made in the term APEX and wants to protect its rights. It appears to us that there is a great likelihood of confusion should your client continue to use the APEX and APEX FITNESS marks for its expanding goods and services. Given our client's long history of doing business under the Apex name, and its use which dates back for three quarters of a century before your client came into existence, our client hopes we can resolve this issue amicably.

Our client certainly continues to be open to settlement discussions, and suggests that we suspend the proceedings to permit such discussions to continue if your client is interested. One possible scenario would include permitting your client some period of time to continue to use the APEX FITNESS mark while phasing it out and developing a new brand identity or adopting the 24-HOUR FITNESS brand. You and your client may also have proposals to offer that we have not considered.

Please let me know whether or not your client is amenable to suspending the proceeding and continuing settlement discussions.

I am also enclosing a copy of our client's initial disclosures required by the new TTAB rules.

Very truly yours,



John E. Ottaviani

cc: President, Apex Stores, LLC

been made or if it obtains additional or more accurate information. Petitioner further reserves the right to rely upon such facts, and persons having knowledge of such facts, as may be derived through future discovery or through its continuing investigation in this matter or as may be adduced at trial.

DISCLOSURES

I. Individuals with Discoverable Information --- the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims and defenses, unless the use would be solely for impeachment.

The following individuals are likely to have discoverable information that the Petitioner may use to support its claims and defenses:

1. Andrew Gates, President of Apex Stores, LLC, c/o John Ottaviani, Edwards, Angell, Palmer & Dodge, 2800 Financial Plaza, Providence, Rhode Island 02903 (401) 274 - 9200. Mr. Gates has knowledge regarding the use of Petitioner's various "Apex" marks by it and its predecessors and affiliates (collectively the "Apex Companies") including advertising and marketing information, promotional materials and sales of goods and/or services using the Apex marks, and also regarding service mark and trade mark registrations and corporate structure of the Apex Companies.

II. Categories of Documents in Petitioner's Possession That It May Use to Support Its Claims or Defenses. --- A copy or a description by category and location -- and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims, counterclaims or defenses, unless the use would be solely for impeachment:

Petitioner has in its possession, custody, and/or control documents fitting the below descriptions that it may use to support its claims, counterclaims and defenses:

1. Documents evidencing the Apex Companies' use of the Apex marks.
2. Documents evidencing Registrant's use of its marks.
3. Certificates of Registration and trademark prosecution documents for the Apex marks.
4. Documents relating to the Apex Companies' use, advertising, marketing and promotion of the Apex marks.
5. Documents relating to the Apex Companies' efforts to enforce its trademark rights in and to the Apex marks.
6. Documents relating to sales of goods and/or services made using the Apex marks.

The above documents are available at the following location(s):

1. Such documents are located at the Apex Companies' corporate headquarters and warehouses in Pawtucket, Rhode Island, and/or on the Internet.

In addition, Petitioner reserves the right to use additional documents that are currently in the possession of Registrant, which will be revealed during discovery, to support its claims, counterclaims and defenses.

III. Computation of Damages:

A computation of each category of damages claimed by the disclosing party whom must also make available for inspection and copying as under rule 34 the documents or other evidentiary materials, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

NONE AVAILABLE AT THIS TIME.

IV. Insurance Agreements:

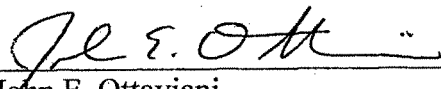
For inspection and copying under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

NONE AVAILABLE AT THIS TIME

Apex Stores, LLC reserves the right to supplement or amend these disclosures as may be appropriate.

APEX STORES, LLC
By its attorneys,

DATED: March 10, 2008


John E. Ottaviani
Edwards Angell Palmer & Dodge LLP
2800 Financial Plaza
Providence, Rhode Island 02903
Tel: (401) 274-9200
Fax: (888) 325-9049
jottaviani@eapdlaw.com

CERTIFICATE OF SERVICE

I, John E. Ottaviani, hereby certify that on this 10th day of March, 2008, this document was served via facsimile and first class mail, postage prepaid, to the following attorneys of record for Registrant:

Susan E. Hollander, Esq.
Britt L. Anderson, Esq.
Christine M. Klenk, Esq.
Manatt Phelps & Phillips LLP
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
Fax: (415) 291-7474

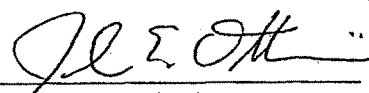

John E. Ottaviani

EXHIBIT 5



Britt L. Anderson
Manatt, Phelps & Phillips, LLP
Direct Dial: (415) 291-7403
E-mail: BLAnderson@manatt.com

April 11, 2008

Client-Matter: 23632-098

**VIA FACSIMILE AND EMAIL
FOR SETTLEMENT NEGOTIATIONS ONLY
PURSUANT TO FEDERAL RULE OF EVIDENCE 408**

John Ottaviani, Esq.
Edwards Angell Palmer & Dodge LLP
2800 Financial Plaza
Providence, RI 02903

Re: Apex Stores, LLC v. 24 Hour Fitness USA, Inc.

Dear Mr. Ottaviani:

We write to respond to your letter of March 12, 2008 regarding the above cancellation proceeding, with which you served your client's initial disclosures. We note to begin that your initial disclosures were served approximately three weeks after the date specified in the TTAB's scheduling order. Other than blatant disregard of its obligations under the Federal Rules, there appears to be no reason why Apex Stores would fail to meet this deadline. As well as your client possessing the TTAB's order, we discussed the parties' mutual obligation to serve initial disclosures by February 20 at our meet and confer on January 14, 2008 as well as our follow up discussion around January 28.

24 Hour Fitness finds entirely unacceptable the assertion in your letter that your client has priority and/or superior rights in regard to the APEX name in connection with the health and fitness field as a basis for beginning any settlement discussions. Since at least as early as 1994, 24 Hour Fitness and Apex Fitness have continuously and pervasively used their APEX Marks in connection with a wide range of health, fitness and nutrition related products and services. As you are aware, 24 Hour Fitness owns numerous trademark and service mark registrations in connection with a broad set of goods and services for its APEX family of marks, including but not limited to its APEX & Design, APEX FITNESS GROUP & Starman Design, and APEX TRAINING SYSTEM & Starman Design marks. Given these longstanding rights, 24 Hour Fitness rejects any assertion that Apex Stores has sufficient basis to challenge 24 Hour Fitness' use or registration of its APEX Marks or to insist that such marks be phased out.

Since the filing of your cancellation action, 24 Hour Fitness has investigated Apex Stores' activities and has found that your client appears to have recently expanded into 24 Hour Fitness' area of business. We note that your client's recent application under U.S. Serial No. 78/928,022 encompasses 24 Hour Fitness' services related to distributorships featuring vitamins

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manatt | phelps | phillips

John Ottaviani, Esq.

April 11, 2008

Page 2

and fitness programs. In fact, the U.S. Patent & Trademark Office refused this application based, in part, upon 24 Hour Fitness' prior filings. In addition, your client's marketing of goods in the health and fitness field, and particularly your client's expansion into the "sporting goods & fitness" category, via its website, appears to have commenced only very recently.

Despite these facts, 24 Hour Fitness continues to view a consent agreement under which the parties would agree to confine their activities under their APEX marks to their respective business areas as a potentially reasonable resolution of this matter. Let me know if your client is interested in discussing a consent agreement on this basis.

Sincerely,



Britt L. Anderson

cc: 24 Hour Fitness USA, Inc.
Susan Hollander, Esq.

90007851.2

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

FILED

MAY 05 2008

U.S. DISTRICT COURT
DISTRICT OF RHODE ISLAND

APEX, LLC,
APEX AT HOME, LLC

Plaintiffs,

v.

24 HOUR FITNESS USA, INC.,

Defendant.

C.A. No. 08-

CA 08 169 ML

COMPLAINT

Plaintiffs, Apex, LLC and Apex At Home, LLC (collectively referred to as "Plaintiffs") for its complaint against defendant 24 Hour Fitness USA, Inc. ("Defendant" or "24 Hour Fitness"), states as follows:

Nature of the Action

1. This is an action for trademark infringement under Section 32 of the Lanham Act, 15 U.S.C. § 1114 (Registered Trademark Infringement); Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (False Designation of Origin and Unfair Competition; and Common Law Trademark Infringement).

Parties

2. Plaintiff Apex, LLC is a Rhode Island limited liability company having an address and principal place of business at 100 Main Street, Pawtucket, Rhode Island 02860.

3. Plaintiff Apex At Home, LLC is a Rhode Island limited liability company having an address and principal place of business at 100 Main Street, Pawtucket, Rhode Island 02860.

4. Upon information and belief, Defendant 24 Hour Fitness is a California corporation having an address and principal place of business at 12647 Alcosta Blvd., 5th Floor, San Ramon, California 94583.

Jurisdiction And Venue

5. This Court has subject matter jurisdiction over plaintiff's claims pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331 and 1338, and 28 U.S.C. § 1367(a).

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

7. 24 Hour Fitness has sufficient minimum contacts with the State of Rhode Island to subject it to the personal jurisdiction of this Court pursuant to Rhode Island's Long-Arm Statute, R.I. Gen. Laws § 9-5-33.

Apex's Proprietary Interest in its Distinctive Trademark

8. Since at least as early as 1942, Plaintiffs and/or their predecessors and affiliates (hereinafter collectively referred to as "Apex") have consistently provided and continue to provide retail services. Over the years, Apex expanded these services to include without limitation, the operation of retail department stores, specialty concepts stores, mail order operations and online retail operations. Since at least as early as the 1960s, Apex's retail services have included a wide variety of general merchandise and services, including without limitation sporting goods, athletic apparel, athletic footwear, athletic equipment, fitness equipment, various food items and products, health and beauty

products, related fitness accessories and a wide variety of other related and unrelated items (the "Apex Services").

9. The Apex Services are offered throughout the United States, including the State of Rhode Island.

10. Plaintiffs are the owners of a family of common law and registered APEX trademarks, which have been in continuous use since 1942 (APEX) and 1996 (APEX ONLINE and APEX STORES) in connection with various retail store, mail order purchase and computerized online retail services. These trademarks include but are not limited to the trademarks identified on Exhibit A hereto (the "APEX Marks").

11. Apex has provided the Apex Services under its APEX Marks throughout the United States, including the State of Rhode Island.

12. Registration of the APEX Marks constitutes conclusive evidence of Apex's exclusive right to use the APEX name and mark in connection with the Apex Services throughout the United States, including the State of Rhode Island.

13. Registration of the APEX Marks entitles Apex to prevent others from using the mark in a confusingly similar manner in the field of retail store services or in connection with any services confusingly similar to the Apex Services.

14. The APEX Marks cover the broad category of retail store services, without limitation as to specific industry areas or types of products sold.

15. The Apex Services are offered under one or more of the APEX Marks to consumers in a variety of industry sectors, including the health and fitness industry (the "Apex Consumers").

16. Since long before any date on which 24 Hour Fitness first used its confusingly similar marks, Apex has offered the Apex Services to the Apex Consumers under the APEX Marks.

17. As a result of widespread public use and recognition, the APEX Marks have become assets of substantial value and goodwill as indicators of the source for Apex and the Apex Services.

18. The Apex Services are promoted and marketed under the APEX Marks through substantial and ongoing business activities, including on physical retail stores, in a wide variety of advertising including newspaper advertisements, radio and television advertisements, on in store materials, and online through various domain names and/or Websites.

19. Apex has been actively expanding its use of the APEX Marks and continues to market its retail services under one or more of the APEX Marks throughout the United States and in Rhode Island.

20. Apex has expended significant time, money and effort in advertising and promoting the APEX Marks, the Apex Services provided under these marks, and in developing substantial and exclusive goodwill and reputation in connection with the Apex Services.

21. As a result of these expenditures, combined with substantial sales of quality services under the APEX Marks, the relevant purchasing public has come to recognize the brand name APEX as favorably distinguishing the Apex Services from those of others.

22. The APEX Marks serve as symbols of and sources for the highest standards in retail services.

Defendant's Infringing Use of the APEX Marks

23. Defendant 24 Hour Fitness operates a chain of health and fitness clubs and, upon information and belief, through its wholly owned subsidiary, Apex Fitness, Inc., offers fitness and nutrition programs and products throughout the United States and in the State of Rhode Island.

24. Upon information and belief, on or before May 2, 2008, 24 Hour Fitness commenced offering retail store services under the identical mark APEX, through its website *apexfitness.com* (the "Infringing Website"), in the provision of sales of merchandise, including various food products and distributorships featuring vitamins and fitness programs (the "Infringing Services"). See Exhibit B.

25. Defendant is the record owner of U.S. Trademark Registration Nos. 2,701,627; 2,703,428; and 2,936,205 for the marks APEX TRAINING SYSTEM (and design); APEX FITNESS GROUP; and APEX covering, *inter alia*, the Infringing Services (the aforementioned trademark registrations owned by defendant hereinafter referred to as the "Defendant's Registrations").

26. Defendant's Registrations cover goods and/or services that fall within the scope of the services covered by the APEX Marks. The United States Patent and Trademark Office improperly granted each of the Defendant's Registrations. Defendant's Registrations should be cancelled on grounds of likelihood of confusion with Plaintiffs prior and longstanding rights in and to the APEX Marks.

27. The Infringing Services are offered to consumers under the APEX trademark and the marks identified in Defendant's Registrations (collectively, the "Infringing Marks"), one or more of which are prominently displayed throughout the Infringing Website.

28. The Infringing Marks are confusingly similar to one or more of the APEX Marks, in which Apex has prior and exclusive rights.

29. Upon information and belief, the Infringing Services are offered in the same channels of trade and to the same class of consumers as the Apex Services and the Apex Consumers.

30. Upon information and belief, consumers located in all fifty states, including the State of Rhode Island, can access and transact business with defendant through the Infringing Website.

31. Upon information and belief, the Infringing Services are marketed, sold, or offered for sale to consumers, including the Apex Consumers, in interstate commerce in all fifty states, including the State of Rhode Island.

32. Upon information and belief, these activities by defendant have been continuous with the intent to solicit business from potential consumers, including the Apex Consumers, located anywhere in the United States, including the State of Rhode Island.

33. The term APEX appears prominently on the Infringing Website.

34. The dominant portion of each of the Infringing Marks is identical to the dominant portion of each of the APEX Marks, i.e., APEX.

35. Upon information and belief, defendant targets, sells and offers to sell the Infringing Services to the same class of purchasers that are familiar with and to whom the Apex Services are sold under the APEX Marks.

36. Because of the identity between the APEX Marks and the Infringing Mark, consumers, including the Apex Consumers, are likely to transact business with the defendant, mistakenly believe that it is sponsored by or affiliated with Apex and/or the Apex Services.

37. Defendant's infringing activities are likely to cause confusion, mistake and deception among the consumer public as to the origin of the Infringing Services.

38. Upon information and belief, defendant's use of the Infringing Marks create a false designation of origin, which is likely to cause confusion as to the affiliation, sponsorship or approval of defendant with Plaintiffs.

39. By letter dated, March 10, 2008, Plaintiffs sought defendant's agreement to discontinue use of the APEX mark, after a reasonable phase-out period, in connection with the Infringing Services.

40. By letter dated April 11, 2008, defendant rejected Plaintiffs settlement offer and indicated that it will continue use of the APEX mark in connection with retail store services.

COUNT ONE:
REGISTERED TRADEMARK INFRINGEMENT
UNDER SECTION 32 OF THE LANHAM ACT, 15 U.S.C § 1114

41. Plaintiffs repeat and re-allege each and every allegation of paragraphs 1 through 40 as though fully set forth herein.

42. 24 Hour Fitness's actions constitute infringement of the APEX Marks in violation of Apex's rights under Section 32 of the Lanham Act, 15 U.S.C. § 1114.

43. As a direct result of defendant's unlawful activities, Apex has suffered and will continue to suffer damages in an amount presently unknown and to be ascertained at the time of trial.

44. Defendant's conduct has caused and will continue to cause injury to Apex to its goodwill and reputation, and will continue to both damage Apex and the public unless enjoined by this Court.

COUNT TWO:
FALSE DESIGNATION OF ORIGIN
UNDER SECTION 43(a) OF THE LANHAM ACT, 15 U.S.C. § 1125(a)

45. Plaintiffs repeat and re-allege each and every allegation of paragraphs 1 through 44 as though fully set forth herein.

46. Defendant's actions constitute a false designation of origin under 15 U.S.C. § 1125(a), which is likely to cause confusion, mistake or to deceive and has confused and deceived consumers into believing that defendant and the Infringing Services are affiliated with, sponsored by, or somehow connected with Apex and/or the APEX Marks.

47. Defendant's unlawful activities reflect adversely on Apex because Apex has no ability to control the quality of defendant's services, and as the believed source of origin, Apex's efforts to continue to protect its reputation for high quality services will be hampered, resulting in the loss of sales thereof to the irreparable harm of Apex.

48. As a direct and proximate result of defendant's above-described actions, Apex has suffered and will continue to suffer damages in an amount presently unknown and to be ascertained at the time of trial.

COUNT THREE:
UNFAIR COMPETITION UNDER SECTION 43(a) OF THE LANHAM ACT,
15 U.S.C. § 1125(a)

49. Plaintiffs repeat and re-allege each and every allegation of paragraphs 1 through 48 as though fully set forth herein.

50. Defendant's actions constitute unfair competition under 15 U.S.C. § 1125(a), by passing off its mark for that of Apex in a manner that is false, misleading, and misrepresents the nature, characteristics and qualities of defendant's services.

51. As a direct and proximate result of defendant's above-described actions, Apex has suffered and will continue to suffer damages in an amount presently unknown and to be ascertained at the time of trial.

COUNT FOUR:
COMMON LAW UNFAIR COMPETITION

52. Plaintiffs repeat and re-allege each and every allegation of paragraphs 1 through 51 as though fully set forth herein.

53. The above-described acts constitute unfair competition under the common law of the State of Rhode Island.

54. As a result of defendant's unfair competition, Apex has been damaged in an amount to be ascertained at trial.

COUNT FIVE:
COMMON LAW SERVICE MARK INFRINGEMENT

55. Plaintiffs repeat and re-allege the allegations set forth in paragraphs 1 through 54 of the Complaint as if set forth at length herein.

56. The above-described conduct of defendant constitutes a violation and infringement of the rights of plaintiff to and in the mark and name APEX at common law.

57. Plaintiff has been damaged by defendant's acts complained of, defendant has profited thereby, and unless defendant's conduct is preliminarily and permanently enjoined, plaintiff and its goodwill and reputation will suffer immediate, substantial and irreparable injury that cannot be adequately calculated and compensated in monetary damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for an order of the Court:

A. For a permanent injunction restraining 24 Hour Fitness its officers, directors, principals, agents, servants, employees, successors and assigns, and all individuals acting in concert or participation with it, from:

- i) infringing Plaintiffs' trademark rights; and
- ii) unfairly competing with Plaintiffs.

B. Directing 24 Hour Fitness to file with the Court and serve on counsel for Plaintiffs, within thirty days after entry of any injunction issued by the Court in this action, a sworn statement as provided in 15 U.S.C. § 1116 setting forth in detail the manner and form in which 24 Hour Fitness USA, Inc. has complied with the injunction;

C. Directing 24 Hour Fitness to account to Plaintiffs for any and all profits derived by 24 Hour Fitness from the sale of the Infringing Services bearing the Infringing Mark;

D. Awarding Plaintiffs a monetary judgment against 24 Hour Fitness for Plaintiffs' damages and 24 Hour Fitness's profits pursuant to 15 U.S.C. § 1117;

E. Trebling the amount of such award on account of 24 Hour Fitness 's willful, intentional, and bad faith conduct pursuant to 15 U.S.C. § 1117;

F. Awarding Plaintiffs their reasonable attorneys' fees, costs and disbursements incurred herein in view of 24 Hour Fitness's intentional and willful infringement, pursuant to 15 U.S.C. § 1117;

G. Ordering the cancellation of Defendant's Registration before the United States Patent and Trademark Office; and

H. Awarding Plaintiffs such other and further relief as the Court may deem just and proper.

APEX, LLC, APEX AT HOME, LLC

By Their Attorneys,

A handwritten signature in black ink, appearing to read 'R. M. P.', is written over a horizontal line.

Raymond M. Ripple (#6489)

Heather A. Pierce (#7345)

EDWARDS ANGELL PALMER & DODGE LLP

2800 Financial Plaza

Providence, Rhode Island 02903

(401) 274-9200

(401) 276-6611 (Fax)

Dated: May 5, 2008

A

EXHIBIT A
The APEX Marks

No.	Serial #	Registration #	Word Mark	Int'l Class/es	Goods/Services	Owner
1	74430251	1847961	APEX	42	Retail department store services.	Apex, LLC
2	75781411	2562812	APEX ONLINE	35	Retail store, mail order purchase and computerized on-line retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, housewares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, giftware, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes, athletic footwear, novelties, food and Christmas items.	Apex, LLC
3	75781412	2443933	APEX STORES	35	Retail store, mail order purchase and computerized on-line retail services, featuring, domestics, furniture, bedding, kitchenware, major appliances, small appliances, housewares, bathroom accessories, living room and bedroom accessories, table top accessories, flatware, power equipment, electronics, photography, jewelry, cosmetics, toys, giftware, music and video, gardening, handbags, sporting goods, clocks, luggage, home office, grills, clothing, men's and ladies' accessories, shoes, athletic footwear, novelties, food and Christmas items.	Apex, LLC
4	78319107	2918976	APEX ADVANTAGE	40	Custom finishing and embellishment of promotional items, namely, embroidery, embossing, engraving, customized printing, imprinting, screen printing and pad printing with company names, logos, monograms, words, and/or pictures for promotional and advertising purposes on the goods of others, namely, sportswear, apparel and other products.	Apex, LLC

EXHIBIT A
The APEX Marks

No.	Serial#	Registration #	Word Mark	Int'l Class/es	Goods/Services	Owner
5	78928022	N/A	APEX COMPANIES	35	Promoting the goods and services of others by placing advertisements and promotional displays in an electronic site accessed through computer networks; providing an on-line advertising guide featuring the goods and services of others; electronic retailing services and ordering services via computer featuring a wide variety of merchandise; Retail store and advertising services, featuring a wide variety of merchandise; arranging for others the repair, service and replacement of a wide variety of general merchandise and vehicles; retail automobile parts and accessories stores; retail store services featuring customer pick-up and/or payment of newly purchased or repaired merchandise; pick up and delivery services; business, advertising, marketing and management consulting services.	Apex, LLC
				37	Automobile repair and maintenance.	

A handwritten signature or set of initials in black ink, located in the upper right corner of the page. The signature is stylized, with a large, looped 'B' and a smaller, less distinct character to its left.



you set the goal, we provide the path.

search

go

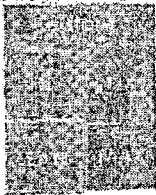
club finder

city

state

go

products



Apex provides cutting-edge nutrition programs and products through health clubs to help you meet your fitness, health, and nutrition goals.

Testimonials

"I love to help others feel better"

Sylvia Mendoza: I am so excited! I love the effects of Apex products. I have been exercising since I was 12 years old and have not stopped. While in college, I took a job as a fitness instructor for Jack LaLanne European Health Spas, which helped me to decide to study Kinesiology. Also, this is when I was introduced to advanced vitamin...

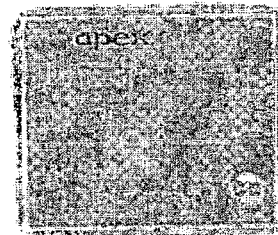
- Apex Champions (testimonials)

Introducing myapex!

Introducing myapex - the new home of the bodybugg™ and Apex To Your Door programs. Access both of your accounts from one place.

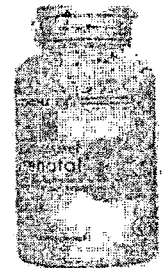
Visit myapex.com to get started.

myapex



Apex Featured Product

Fit Multivitamin - Prenatal (120 count) New Formula!



Nutritional support for before & during pregnancy. One-a-day, optimized formula for an active lifestyle.
 - available to order now!

Apex Education

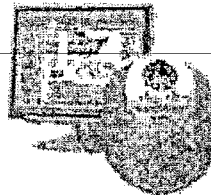
Apex Fitness Professional Certification (Interactive CD-Rom). Find out more [click here](#)

eLearning CEC Courses

Our Continuing Education Credits are now online! Instead of having to wait for a workshop to come to your area, you can view the course of your choice online and go through it at your own pace. Our continuing education credits range from exercise and nutrition to a comprehensive analysis of the science behind supplementation. Apex gives trainers and fitness professionals a one-stop CEC resource! And now also available in a convenient online format!

For more information on the CEC

bodybugg™



2005 winner:
 POPULAR SCIENCE
 personal health category

see it in action ... [click here](#)

bodybugg™
 the world's most intelligent calorie management system

Resources

Resting Metabolic Rate
 Daily Calorie Needs
 Body Mass Index
 Calorie Burn Indicator
 Angiotensin 191
 Nutrition FAQ
 Nutrition Articles
 Exercise FAQ
 Exercise Articles
 Exercise of The Day
 Special Exercise Programs

ADMIN LOGIN DATA PROFILES Q&A

myapex

you set the goal, we provide the path



home

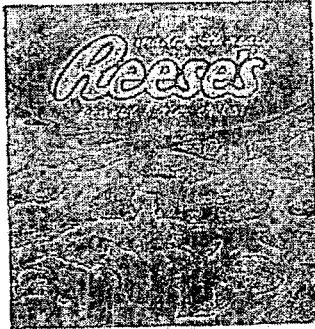
nutrition store

fitness resources

bodybugg®

apex to your door

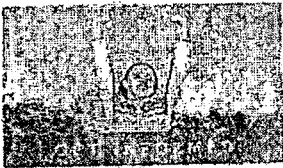
myapex account



Welcome to your complete nutrition resource.

NEW! Iced Peanut Butter Brownie Delight
featuring Reese's peanut butter chips.

Say goodbye to protein bars that taste like cardboard and *hello* to handmade brownies (with 13 grams of protein!). They taste so good you'll forget they're actually good for you.

CHECK IT OUT!**DAILY Q&A**

At what age does a person quit gaining muscle mass? I'm 62 years old and work out five days a week with 2 hours of cardio and another 1 to 1 1/2 hours lifting weights.

All muscle gain depends on experience, genetics, and gender. A novice at any age can acquire muscle tissue. However, as a person ages, the amount of hormones the body produces lessens, making muscle gain slower and more difficult.

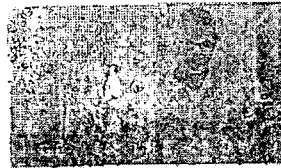
[Read More ▶](#)**Miss a Day? ▶****Send us Your Questions ▶****TESTIMONIALS**

Josh Thigpen: Two-time World's Strongest Man Competitor

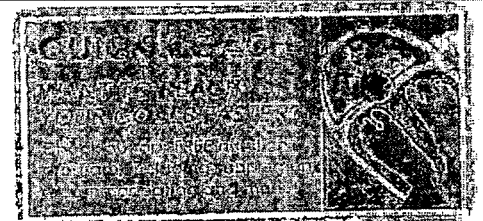
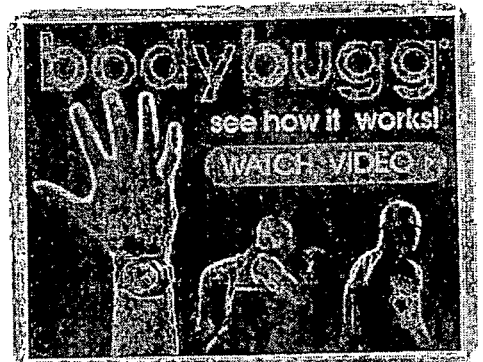
In preparation for the 2008 strongman season, I began stacking Apex products with my training regimen three months ago. The results have been amazing!

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[Other Testimonials ▶](#)
[Send us Your Story ▶](#)

**MONTHLY NEWSLETTER**

Underreporting? Who, me? But I have a slow metabolism. [▶](#)

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Information[Purchase & Download](#)**RECIPE FINDER**

Looking for the perfect recipe to fit in with your diet? Find your ultimate recipe by using our recipe finder.

Keyword: Category: Any categoryCalories: Any caloriesProtein: Any protein



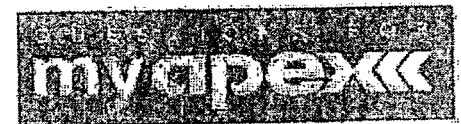
Fat:

Any fat

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Username:

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Email myapex@apexfitness.com or call
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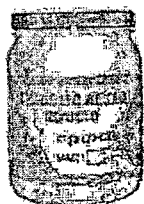
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Sports Performance (MAX)

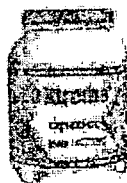
Get More from your Workouts. Apex MAX supplements are specifically formulated to promote the increase of m enhance workout performance, and aid muscles in recovering quickly from exercise.

Purity & Potency are Guaranteed. All Apex supplements are produced by Phoenix Labs, a manufacturer that op a pharmaceutical license and meets and exceeds all federal manufacturing standards.

SPORTS PERFORMANCE (MAX) PRODUCTS



Anabolic Amino Xtreme



NO Xtreme



Volumizer



Creatine



L-Glutamine



Methoxybolic



Recovery



Protein

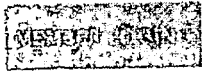


Workout

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Sports Performance (MAX) --> Workout --> MAX Workout



MAX Workout

Drive Through Intense Workouts (with Caffeine & Ginseng).*

This unique formula supports energy metabolism. It is beneficial to exercise activity and designed to improve performance for both aerobic and anaerobic without water retention (as opposed to creatine).*

Best suited for:

Nutrition Facts

Your Price: \$25.95

Package Count: 90/bottle

SKU: 1028

QTY: 1



- Experienced athletes (aerobic and anaerobic) seeking to improve performance without water retention.
- Do not use if you experience adverse effects from stimulants.
- Do not mix with other stimulants.

**These statements have not been evaluated by the FDA. This product is not to diagnose, treat, cure or prevent disease.*

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http://my.apexfitness.com/products/product_details.php?item=1028

5/2/2008

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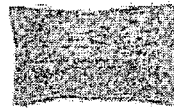
Bars, Cookies & Snacks

These delicious snacks and bars are perfect for calorie control and sound nutrition on the go. They're also ideal pre workout energy sources. All contain optimal, balanced macronutrients and are formulated to complement Apex strength training supplements.

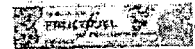
BARS, COOKIES & SNACKS PRODUCTS



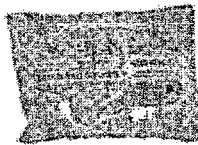
100 Calories Sweet & Salty Crisps (100 calories)



Specialty Snacks (230 calories)



FIT Fruit Fuel Bars (200 calories)



Breakfast Squares (210 calories)



FIT Bars (210-220 calories)



FIX Cookies (160 calories)



FIX Crisp Bars (150-160 calories)



FIT Soy Bars (160 calories)

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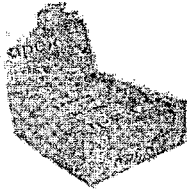
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Bars, Cookies & Snacks --> FIX Crisp Bars (150-160 calories) --> FIX Crisp Bars - Chocolate

FIX Crisp Bars - Chocolate



FIX Crisp Bars are convenient, nutrient-rich meal replacements that are best unable to eat a meal and/or before workouts. They can also be used to increase caloric intake when you're unable to consume whole foods. FIX Crisp Bars provide an ideal ratio of protein, carbohydrates and fat in a form that is easily digested and assimilated by the body. Click here for more info on Fitness Fast Foods.

A light, crispy energy quick fix.

calories 150	carbs 23g
protein 9g	fat 3.5g (0g trans fat)
fiber 3g	calcium 10% Daily Value

Nutrition Facts

Your Price: \$21.95

Package Count: 12/box

SKU: 2023

QTY: 1



Best suited for:

- Anyone as
 - A meal substitute
 - An aid to satiety
 - An early morning pre-workout meal
 - A better dessert option
- An experienced exerciser
 - As a pre- and post-workout meal to enhance training and recovery
 - Can be used during training

**It is not recommended that more than one-third of your total calories be in the form of meal replacement foods unless medically supervised. Consult your doctor before starting any diet.*

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Bars, Cookies & Snacks --> 100 Calories Sweet & Salty Crisps (100 calories) --> 100 Calories Sweet & Salty Crisps - Barbecue

100 Calories Sweet & Salty Crisps - Barbecue



Apex 100 Calorie products are portion-controlled, low-calorie snacks and are satiety aid between meals. Foods in this category are not usually nutritional but are designed to satisfy the urge to "cheat". Try our delicious Kettle Corn won't believe they're guilt-free!

The use of Apex 100 Calorie Snack Products with other Apex supplements at total nutrient intakes to be within a safe and optimal range.

65% Less Fat, 100% of the Flavor.

[Nutrition Facts](#)

calories 100
trans fat 0g

saturated fat 0g

Your Price: \$10.50

Package Count: 6/box, 23g bags

SKU: 5017

QTY: 1

Best suited for anyone as:

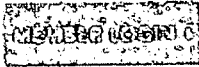
- An addition to a meal
- A 100-calorie snack
- An aid to satiety
- A healthier alternative to regular potato chips



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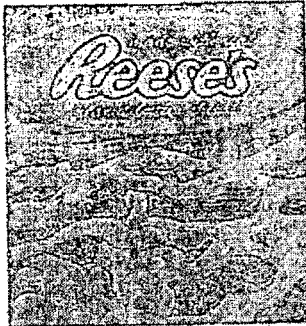
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It's here! The Iced Peanut Butter Brownie Delight

This handmade brownie features real Reese's peanut butter chips . . . and it's so good you'll forget it's actually good for you.

Order yours today!



Multivitamins for the whole family as well as Ginkgo, Calcium, Vitamin C and more.

[View Products »](#)



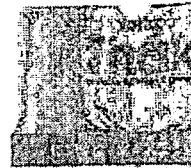
Fat Burn and Appetite Control formulas can help you break through a plateau & reach your goals faster.

[View Products »](#)



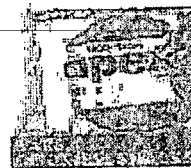
Gain muscle & help your muscles recover more quickly with formulas like Creatine, Workout, Recovery and more.

[View Products »](#)



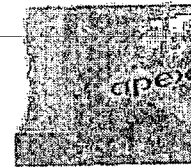
Versatile drink mixes and our popular Workout Shake offer nutrition and satiety pre- and post-workout.

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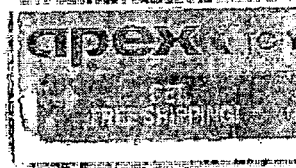
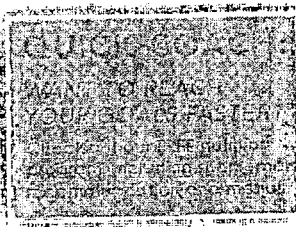
These delicious snacks, bars and protein cookies are perfect for calorie control and sound nutrition on the go.

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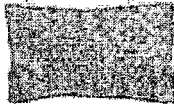
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Bars, Cookies & Snacks --> Specialty Snacks (230 calories) --> Iced Peanut Butter Brownie De

Iced Peanut Butter Brownie Delight



The Iced Peanut Butter Brownie Delight is hand made using real Real Butter. Each brownie is nutrient rich and contains more protein than They are best used when unable to eat a meal and/or before workouts. They used to increase daily caloric intake when unable to do so by consuming whe These brownies make a satisfying, nutritious dessert. Because of their conv nutrition, and great taste, they are an optimal meal replacement or supplerr

Iced Peanut Butter Brownie Delight

This high protein brownie supports optimal health with a perfect ble essential nutrients.

Nutrition Facts

Your Price: \$30.00

Package Count: 12 brownies/box

calories 240	carbs 28g
protein 13g	fat 8g (0g trans fat)

Best suited for:

- Anyone as
 - A better dessert option
 - A meal substitute
 - An aid to satiety
 - An early morning pre-workout meal*
- An experienced exerciser
 - As a pre- and post-workout meal to enhance training and recd
 - Can be used during training

*It is not recommended that more than one-third of your total calories be si the form of meal replacement foods unless medically supervised. Consult yo before starting any diet.

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Optimal Health (FIT)

Purity & Potency are Guaranteed.

Apex formulas are based on the latest scientific data and are produced under strict pharmaceutical manufacturing. Our Multivitamin & Mineral supplements meet the different nutrient needs of individuals based on age, gender and they also account for nutrients obtained through food by the average person. Each FIT Multivitamin & Mineral form basic antioxidant needs.

All other supplements in the Apex line are intended to work in conjunction with FIT Multivitamin & Mineral formula assures that you remain in a safe and optimal range of nutrient intake at all times.

OPTIMAL HEALTH (FIT) PRODUCTS



Multivitamin



Advanced Calcium



General Health



Vitamin C



Super Antioxidant



Joint Support



Ginkgo



Premenstrual Formula

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Optimal Health (FIT) --> Multivitamin --> FIT Multivitamin - Children's Chewables

FIT Multivitamin - Children's Chewables

*Customized Formula for Growing Children.**



Over 90 percent of American children do not consume enough of some of the nutrients needed for optimal health. A daily multivitamin and mineral formula can help children get the nutrients they need. The Apex Children's Chewable Multivitamin Mineral Formula is designed specifically for children.*

Why An Apex Multivitamin?

Apex multivitamin formulas are:

- formulated for the nutrient needs of an active lifestyle.
- based on the latest scientific research, not marketing hype.
- manufactured in a pharmaceutically registered facility (guarantees potency).
- contain a controlled release system for optimal nutrient absorption.*

Nutrition Facts

Your Price: \$7.95

Package Count: 60/bottle

SKU: 1026

QTY: 1



Best suited for: Active children between the ages of 2-12.

Key Benefits: Customized formula for growing children.*

**These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent disease.*

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